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No.

In The

Supreme Court of the United States

October Term, 1994

YONG HYON KIM,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Is there a "seizure" implicating Fourth Amendment rights where an officer confronts a train passenger in his private sleeping compartment, blocks his exit from the room, asks him focused and incriminating questions (albeit in a polite tone), and fails to advise him that he has a right to terminate the encounter and then asks for and receives consent to search his luggage for drugs?

II. Does *Florida v. Jimeno*, 500 U.S. 248 (1991), sanction the opening of a factory-sealed canister found inside a suspect's luggage, based solely on the suspect's consent to search his bags, on the theory that a reasonable person would believe that the canister could function as a drug container?

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Yong Hyon Kim, respectfully petitions this Court to issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this proceeding on June 30, 1994.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is published at 27 F.3d 947. The slip opinion is reprinted as Appendix B.

By order dated July 27, 1994, the Court of Appeals denied a petition for rehearing. The order is reprinted as Appendix A.

The trial court's May 12, 1993 memorandum opinion on the motion to suppress is available on Westlaw at 1993 WL 175251, and also is reprinted as Appendix C.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was entered on June 30, 1994. A timely petition for rehearing in banc was denied on July 27, 1994. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

Pursuant to Supreme Court Rule 13.1 and 28 U.S.C. § 2101(c), this petition is timely filed within ninety (90) days of the denial of the petition for rehearing.

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment of the United States Constitution provides in pertinent part:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause. . . .

STATEMENT OF THE CASE

On August 26, 1992, petitioner, Yong Hyon Kim, and his traveling companion, Song Youn, were approached by DEA Agent Kevin Small in their Amtrak train sleeper compartment during a brief stop in Albuquerque, New Mexico. Agent Small and his

partner, Officer Sam Candelaria, had singled out Kim and Youn for questioning because the train originated from a drug source city (Los Angeles), they had purchased one-way tickets with cash a few days before departure and had upgraded to a sleeper car en route. The officers had no other reason to believe that Kim or Youn were carrying drugs or were otherwise involved in criminal activity; reasonable suspicion to make an investigative stop was clearly lacking.

Agent Small approached Kim's roomette, while Officer Candelaria hid out of view. Small was in street clothes, but carried a concealed gun in his waist pack. The agent was also wearing a hidden body recorder, which he activated before knocking on the door to Kim's room. When Kim opened the door, Agent Small immediately identified himself as a police officer and bent over to show the two passengers his DEA badge. Kim and Youn were seated in the sleeper's two retractable seats, facing each other. The roomette was no more than seven feet wide and four feet deep.

After Kim and Youn looked at Small's badge, the agent knelt in the doorway and asked whether he could talk to them. One of the two responded, "Yeah." Agent Small proceeded to ask several questions of Kim and Youn, including their point of origin, destination and citizenship. He asked to see their tickets; they complied. Kim's ticket was in his name; Youn's ticket was in a different name. The agent asked whether they had picture identification. Kim had identification (although Small did not ask to see it), but Youn did not. At no point did Agent Small advise the men that they need not answer any questions or that they had a right to terminate the encounter at any time.

Agent Small advised Kim and Youn that he worked for DEA and that they were "having problems with people on board trains smuggling drugs out of L.A. back East." Small then pointedly

asked, "You guys don't have drugs in your luggage today, do you?" Kim replied, "No." Agent Small then inquired, "Would you voluntarily consent for me to search?" Kim replied, "Sure."

Agent Small pointed to a leather bag in the room and asked if it was Kim's. Kim answered yes. Small looked through the bag and found six factory-sealed metal cans. The labels read: "Naturade All-Natural Vegetable Protein." Small asked what they were and Kim replied that it was vegetable protein. Youn volunteered that it was used "[f]or health" and that the canisters were closed. Kim said that he had received the vegetable protein as a present in Los Angeles, but he did not know what it was used for.

Without asking permission to open the canisters, Agent Small snapped off the factory-sealed lid of one of the containers and observed a powdery substance. Small then asked Kim who gave him the canisters, to which Kim responded, "The guy from L.A." Agent Small asked, "What guy?" Kim had not yet answered when Small handed the opened canister to Candelaria, who had up to this point stayed out of sight. Candelaria searched the container's contents and found a plastic bag containing methamphetamine. Kim and Youn were arrested.[1]

Kim moved to suppress the evidence, arguing that the encounter was nonconsensual and that he had been seized in violation of the Fourth Amendment in light of the totality of the circumstances, especially considering the following factors:

(1) Agent Small confronted Kim in a non-public part of the train (his private sleeping compartment);

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1. Kim and Youn were indicted in the District of New Mexico for possession of methamphetamine. This indictment was dismissed by the government. Kim was then indicted in the Eastern District of Pennsylvania for conspiracy and possession with intent to distribute six kilograms of methamphetamine. Youn was not reindicted.

(2) the agent blocked Kim's exit from the roomette;

(3) Small asked Kim focused and incriminating questions; and

(4) the agent never advised Kim that he had the right not to answer any questions and to terminate the encounter.

The district court denied the suppression motion, holding that the encounter did not amount to a Fourth Amendment seizure because it was voluntary and consensual. The district court also found that Kim's general consent to search his luggage included opening any container found in his bags. Appendix C, 62a.

A divided panel of the Third Circuit Court of Appeals affirmed. On the issue of whether a seizure occurred, the majority said it was applying the "totality of the circumstances" test of *Florida v. Bostick,* 501 U.S. 429, 111 S. Ct. 2382 (1991), to determine whether "a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter." The panel majority concluded that the encounter was consensual and did not amount to a Fourth Amendment seizure because:

> [W]e believe the encounter was not coercive. The totality of the circumstances demonstrates that Kim voluntarily answered Small's questions, and was, cooperative during the entire encounter.

Appendix B, 16a. The majority minimized each of the factors cited by Kim and focused on the fact that Agent Small was in plain clothes, seemed to be alone and unarmed and spoke in a polite tone and also that Kim was cooperative.

Judge Becker, dissenting, criticized the majority opinion for

viewing each potentially coercive factor in isolation, rather than in combination and essentially requiring Kim to present some piece of evidence that, in itself, would make the encounter a seizure. This approach, according to the dissent, transforms *Bostick's* "totality of the circumstances" analysis into a mirror image of the *per se* approach that *Bostick* rejected. Appendix B, 44a. Judge Becker found a seizure, based on the four circumstances enumerated above.

The majority also concluded that Kim's consent to search his luggage included permission to open the sealed canister. Relying on *Florida v. Jimeno,* 500 U.S. 248, 111 S. Ct. 1801 (1991), the panel held that "a reasonable person would understand Kim's authorization to search his luggage to include permission to search any containers in which drugs might be found. Appendix B, 20a. The court relied on this Court's statement that "[a] reasonable person may be expected to know that narcotics are generally carried in some form of a container" [*Jimeno,* 111 S. Ct. at 1804].

The dissent faulted the majority for framing the consent issue "as a matter of whether or not the canisters reasonably could have contained drugs." Appendix B, 47a n.7. Rather, the key question should have been whether the factory-sealed canisters were more like the folded paper bag in *Jimeno* or a locked briefcase, the object of the search in *State v. Wells,* 539 So.2d 464 (Fla. 1989), *aff'd on other grounds,* 495 U.S. 1 (1990), of which this Court in *Jimeno* said, "[i]t is very likely unreasonable to think that a suspect, by consenting to the search of his trunk, has agreed to the breaking open of a locked briefcase within the trunk." *Jimeno,* 111 S. Ct. at 1804.

Judge Becker concluded that it was unreasonable for the agent "to think that the consent to search the luggage gives him license to damage the item by opening it without asking permission." Appendix B, 47a (footnote omitted).

On July 27, 1994, Kim's petition for rehearing in banc was denied by the Third Circuit. Appendix A.

REASONS FOR GRANTING THE WRIT

I.

THE OPINION BELOW CONFLATES "TOTALITY OF THE CIRCUMSTANCES" ANALYSIS WITH A *PER SE* COERCIVE FACTOR TEST THUS DEPARTING FROM THE PRESCRIBED ASSESSMENT OF THE REALITIES OF POLICE-CITIZEN ENCOUNTERS.

The decision below fails to implement *Florida v. Bostick,* and transforms the *Mendenhall, infra,* "totality of the circumstances" test for consensual encounter versus seizure into the *per se* analysis rejected in *Bostick,* by examining each coercive fact in isolation and concluding that no single aspect of the encounter constituted a seizure.

While the panel majority verbalized the "totality of the circumstances" test of *United States v. Mendenhall,* 446 U.S. 544 (1980), to determine the seizure issue, the opinion below actually demanded that defendant show that some fact by itself made the encounter a seizure. The dissent rightly observes that this approach "transforms the 'totality of the circumstances' analysis of *Bostick* into a mirror image of the *per se* approach rejected in *Bostick.*" Appendix B, 44a. Because the decision below applies such an unrealistic methodology to "totality" issues it is unfaithful to the analysis of *Mendenhall* and *Bostick* and imposes an unwarranted burden on defendants.

In *Bostick,* the Court modified the *Mendenhall* "free to leave" test for public transport vehicles, holding that the appropriate inquiry is not whether the citizen would feel free to leave when questioned by an officer, but in vehicle cases "whether a

reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter. 111 S. Ct. at 2387. The *Bostick* Court reaffirmed *Mendenhall's* requirement that the "totality of the circumstances" be considered in deciding what conduct constitutes a 'seizure," emphasizing that no single factor is controlling.

The panel majority below first isolated, then individually explained away four significant factors that, had a true "totality of the circumstances test been applied, would in any measurement of their concerted impact on Kim have compelled the conclusion that he was seized by Agent Small. These factors are briefly analyzed here.

A. Location

The panel accorded little weight to the location of the encounter in a cramped (4' x 7') private sleeping compartment of a train because (1) the "location of the encounter does not itself deprive an individual of his ability to terminate an encounter," and (2) a confined area in a train "is not inherently coercive." Appendix B, 10a.

In both *Mendenhall*, 446 U.S. at 555 and *Florida v. Rodriguez*, 469 U.S. 1 (1984), encounters were sanctioned as voluntary, largely based on the fact that the defendant was questioned by the officers in a public concourse or lobby in full public view.

Florida v. Royer, 460 U.S. 491 (1983), found the location in an airport concourse important to the conclusion that the initial encounter was not a seizure.

> Law enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public

> place, by asking him if he is willing to answer some questions, . . .

Royer, 460 U.S. at 497 But a seizure occurred when the "officers identified themselves as narcotics agents, told Royer that he was suspected of transporting narcotics, and *asked him to accompany them to the police room*," because:

> What had begun as a consensual inquiry in a public place had escalated into an investigatory procedure in a police interrogation room.

Id., 460 U.S. at 502-03.

Bostick supports the view that the location of the encounter is important in determining whether a seizure has taken place. Focusing on location, the Court noted:

> [T]he Fourth Amendment permits police officers to approach individuals at random in airport lobbies and other public places to ask them questions and to request consent to search their luggage. . . .

Bostick, 111 S. Ct. at 2384. "[w]here the encounter takes place is one factor" in determining whether a reasonable person would feel "that he was not at liberty to ignore the police presence and go about his business." *Bostick*, 111 S. Ct. at 2387 (quoting *Michigan v. Chesternut*, 486 U.S. 567, 569 (1988)).

Finally, in *Berkemer v. McCarty*, 468 U.S. 420 (1984), the Court recognized in a *Miranda* context that police-citizen encounters occurring in public settings, where there are other neutral observers, are inherently less coercive than encounters that take place in private. The Court's comments apply with equal force to Fourth Amendment cases:

> The typical traffic stop is public, at least to some degree. Passersby, on foot or in other cars, witness the interaction of officer and motorist. This exposure to public view both reduces the ability of an unscrupulous policeman to use illegitimate means to elicit self-incriminating statements and diminishes the motorist's fear that, if he does not cooperate, he will be subject to abuse.

Berkemer, supra, 468 U.S. at 438.

Two pertinent aspects of the site factor emerge from the precedents, (a) the location must be viewed as part of the entire dynamic of the police approach and reasonable citizen response and (b) in the hierarchy of significance the issue of secrecy/ openness to public view ranks as very important.

A last word on location; the Court below passes over the fact that these two men of oriental extraction were accosted, not in Los Angeles, Chicago or New York City but in Albuquerque, New Mexico.

B. Advice of Rights

Unlike the defendant in *Bostick,* Kim was not informed that he had a right to terminate the encounter and could refuse consent. The opinion below found this fact not controlling and, indeed, not significant because "the absence of such advice does not necessarily eliminate the consensual nature of the encounter." Appendix B, 15a. By focusing on the advice of rights factor in isolation, rather than as part of a "totality of the circumstances" analysis, the panel deprived this factor of all significance .

While there is no requirement that a suspect be told by a police

officer that he is free to decline to cooperate, the fact that the police did advise Bostick that he had the right to refuse consent was said to be "particularly worth noting." *Bostick*, 111 S. Ct. at 2385. In his dissent Judge Becker, below, opined that this advice was of "critical, and perhaps decisive importance" in *Bostick*. Appendix B, 44a.

Mendenhall says that the fact that defendant was told she could decline to consent was "especially significant" in its assessment of voluntariness. 446 U.S. at 558.

The panel majority here treated the failure to advise as simply one more fact which did not "necessarily eliminate the consensual nature of the encounter." Appendix B, 11a. This rubric is not relevant to "totality" analysis. The court's focus should have been the appropriate weight to accord the absence of warnings interacting with and possibly potentiated by location, accusatory questioning, isolation, cramped quarters and blocked exit surrounding the encounter.

While failure to advise, by itself, might not have created a seizure, it was an important interactive factor that should have been viewed through an integrating prism in whose light it could have tipped the "balance under a true totality of the circumstances analysis." Appendix B, 00a

C. Focused and Incriminating Questioning

A statement by the police to a citizen that he is a suspect in criminal activity is a factor to be considered in determining whether a seizure has occurred because it evokes, even in the innocent, feelings of guilt and fear and the apprehension of negative official reaction, including possible detention. In *Royer*, the Court said, "[t]he detective's statement to Royer that he was suspected of transporting narcotics also bolstered the finding that

Royer was 'in custody' at the time the consent to search was given." 460 U.S. at 496. Accusatory, focused questioning subtly tells the suspect that he is not free to terminate the encounter.

An officer's accusations need not be explicit in order to communicate his desire to limit a suspect's freedom. Here, Agent Small first questioned Kim about his citizenship, telegraphing suspicion that he might be an illegal alien. After demanding and receiving Kim's ticket and identification, Small asked, "You guys don't have any drugs in your luggage today, do you?" He had already said that he was a DEA agent looking for drug traffickers. Any reasonable person in Kim's position had to believe that he was a target of the agent's investigation, thus not "free to go about his business."

The panel majority's failure to recognize that Agent Small's direct and focused questioning should have been weighed as a significant coercive factor in the "totality of the circumstances" analysis is another example of its analytical departure from this Court's teachings in a direction which substantially increases the defense burden in suspicionless encounter cases and devalues the security of railroad travel. The treatment accorded below to such questioning is not in accord with *Royer* and conflicts with decisions of the Fifth and Eighth Circuits. *See United States v. Gonzales*, 842 F.2d 748, 752 (5th Cir. 1988) (seizure in an airport occurred when officer told defendant that he was "working narcotics" and asked to look in his bag); *overruled on other grounds, United States v. Hurtado*, 905 F.2d 74 (5th Cir. 1990); *United States v. Nunley*, 873 F.2d 182, 185 (8th Cir. 1989) (seizure occurred when officer told defendant that he was part of a narcotics unit and was trying to stop the flow of drugs through the airport); *see also, United States v. Little*, 18 F.3d 1499, 1512 (10th Cir. 1994) (Logan, J., dissenting) ("[d]irect, focused, or prolonged accusatory questioning in a commanding tone of voice is likely to make a reasonable innocent person feel coerced and unable to terminate a police encounter.")

D. Blocking Exit

Throughout the encounter, Agent Small knelt in the narrow doorway of Kim's roomette, leaned into his compartment and asked him questions. Small effectively blocked the exit. While the *Bostick* majority did not address this factor, Justice Marshall noted in his dissent that a reasonable person whose egress from a bus is blocked is likely to feel less free to decline the officer's requests or otherwise terminate the interview because blocking the individual's exit is part of the police "show of authority." *Bostick*, 111 S. Ct. at 2392-93. This factor was similarly minimized in isolation below.

E. Totality of the Circumstances

Four persuasive factors supporting a conclusion of seizure were presented here, each of which was separately downgraded by the majority below and then discarded as persuasive because none was dispositive by itself. Judge Becker in dissent observes:

> The clear implication of the majority's analysis in this case is that, unless the defendant can come forward with a piece of evidence that would make the encounter a per se seizure, the defendant will not be able to show that there was a seizure. In my opinion, such an approach transforms the "totality of the circumstances" analysis of *Bostick* into a mirror image of the per se approach rejected in *Bostick*. *Bostick* teaches that a court must consider all of the evidence *in combination* to determine whether the circumstances were such that a reasonable person would not feel free to terminate the encounter. The question whether one factor does or does not *necessarily* create a seizure is simply no longer relevant after *Bostick*.

Appendix B, 44a (emphasis in original).

In order to correct the lower court's departure from the *Mendenhall/Bostick* analysis, and to maintain Fourth Amendment legitimacy by demanding realism in reviewing police-citizen encounters, this Court should grant certiorari to review the decision of the Third Circuit below.

II.

THE DECISION BELOW PROVIDES THE COURT WITH AN OPPORTUNITY TO REVIEW THE CURRENT STANDARDS FOR DETERMINING WHAT CONDUCT CONSTITUTES A SEIZURE OF A PERSON BY A SHOW OF AUTHORITY AND PROVIDE CLEAR GUIDANCE TO LOWER COURTS ON THIS TROUBLING ISSUE.

This record clearly and cleanly raises the suspicionless seizure issue. The encounter was tape-recorded by Agent Small, reducing factual dispute to a minimum. The legal issues were framed in the *Mendenhall/Bostick* paradigm from the outset and sharply focused upon by both lower courts. The record below, therefore presents an excellent vehicle for discussion of this fundamental and troublesome issue.

This Court has recognized that "not all personal intercourse between policemen and citizens involves 'seizures' of persons." *Terry v. Ohio,* 392 U.S. 1, 19 n. 16 (1968). Rather, "[o]nly when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred." *Id.* The Terry Court added that, "whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person." *Id.* at 16.

United States v. Mendenhall, 446 U.S. 554 clarified the type of

conduct necessary to constitute a seizure by proposing an objective "totality of the circumstances" test.

> We conclude that a person has been "seized" within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.

The *Mendenhall* "totality of the circumstances" analysis was subsequently adopted by the full Court in *I.N.S. v. Delgado*, 466 U.S. 210 (1984) and in *Bostick*.

In 1983, the Court decided *Royer*. There, a plurality of the Court held that,

> law enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen, or by offering in evidence in a criminal prosecution his voluntary answers to such questions.

Royer, 460 U.S. at 497. But, a seizure did occur there,

> when the officers identified themselves as narcotics agents, told Royer that he was suspected of transporting narcotics, and asked him to accompany them to the police room, while retaining his ticket and driver's license and without indicating in any way that he was free to depart, . . .

Id. at 498.

Since *Royer,* the Court has revisited the "seizure" question on several occasions. *See Florida v. Rodriguez, supra; Delgado, supra; Michigan v. Chesternut, supra; Bostick, supra.*

These decisions have involved police-citizen encounters "incredibly rich in diversity" [*Terry,* 392 U.S. at 13]. Although the Court has noted some important factors in determining whether a police show of authority is such that "a reasonable person would [not] feel free to decline the officers' requests or otherwise terminate the encounter," a workable methodology for making the totality analysis has not clearly emerged.

We see the decision below, however, as departing entirely from the totality assessment, perhaps because this Court has not published more specific directions for using its principles in diverse situations. *Compare United States v. Ward,* 961 F.2d 1526 (10th Cir. 1992) and *United States v. Bloom,* 975 F.2d 1447 (10th Cir. 1992) *with Little, supra,* and *United States v. Thompson,* 941 F.2d 66 (2d Cir. 1991).

In order to minimize inconsistent application of the *Mendenhall/Bostick* "totality of the circumstances" test, the Court needs to establish guidelines consistent with the realities of those police-citizen interactions which approach the boundary of warrantless seizures by "show of authority" and which will command respect for the proper balancing of an individual's Fourth Amendment rights and the police right of inquiry. *Terry, Mendenhall, Royer* and *Bostick* have laid the groundwork. The decision below illustrates a departure from "totality" to "per se" single factor analysis and shows the need for additional Supreme Court direction in this area of basic liberties.

Bostick dealt with a narrow aspect of the seizure analysis, whether the location of the encounter on a bus alone can be dispositive. Rejecting the proposition that one isolated factor can

control in a "totality of the circumstances" assessment, *Bostick* found it unnecessary to rank the relative importance of many other factors which inhere in the seizure calculus. *Mendenhall* earlier attempted to catalog some of the relevant factors but some of those present in Kim's encounter have never been addressed by the Court.

Petitioner respectfully suggests that this case provides an appropriate vehicle to extrapolate from the approach initiated in *Mendenhall* and *Bostick,* to factor in the dynamics of the actual police-citizen meeting with the totality test and take into account the impact on the reasonable, innocent citizen of the combination of impressions created by the officer's actions.

The constitutional measure of freedom from warrantless police restraint and questioning cannot be tested by viewing individual aspects of the encounter separately against a *per se* test. Such artificial analysis serves no interest in the problem. It would measurably help lower courts and others involved in the Fourth Amendment debate for the Court to further explain its perception of totality in the real life exchange of communication between citizens and police in warrantless investigative encounters.

Bostick and the Court's earlier "show of authority" cases do not provide the needed guidance on this important constitutional question. The need for such guidance is urgent because of the growing trend in law enforcement towards the use of methods illustrated by this case in drug interdiction. We have seen a substantial increase in police-citizen encounters of this kind. *See* Appendix B, 34a n. 1 (listing nine published opinions from the Tenth Circuit arising out of Agent Small's drug interdiction efforts alone); *Florida v. Kerwick,* 512 So.2d 347, 348-49 (Fla. App. 1987) (single officer employing bus sweep technique able to search over 3,000 bags in nine-month period); *United States v. Felder,* 732 F.

Supp. 204 (D.D.C. 1990) (detective had interviewed 50 bus and 35 train passengers seeking consent to search). A sense of diminution of freedom among the travelling public approaches a corrosive level of concern.

Certiorari should be granted here to flesh out the "totality of the circumstances" test for cases involving seizures accomplished by a "show of authority."

III.

THE DECISION BELOW EXTENDS *FLORIDA V. JIMENO* BEYOND ANY REASONABLE INTERPRETATION, PERMITTING THE OPENING OF A SEALED CONTAINER INSIDE PETITIONER'S LUGGAGE, WITHOUT OBTAINING SPECIFIC CONSENT TO OPEN THE CONTAINER.

We ask the Court to grant certiorari in this case to determine the limits of petitioner's consent to search his luggage. The panel majority here has done away with recognized limitations on the scope of consent by extending *Florida v. Jimeno*, 500 U.S. 248, 111 S. Ct. 2382 (1991), to permit the opening of any container found within a person's luggage, simply on a showing that the object of the search could be found in the container.

Jimeno cannot be read so broadly. The Court should clarify its limitations here.

In *Jimeno,* the police obtained permission to search the suspect's car for drugs. Opening the passenger's door, the officer found "a folded, brown paper bag on the floorboard." *Jimeno,* 111 S. Ct. at 1803. The officer picked up the bag, and without asking permission, opened it and found cocaine. *Id.* The Court found that Jimeno's consent to search the car extended to opening the bag, stating:

> We think it was objectively reasonable for the police to conclude that the general consent to search respondent's car included consent to search containers within that car which might bear drugs. A reasonable person may be expected to know that narcotics are generally carried in some form of container. "Contraband goods rarely are strewn across the trunk or floor of a car." The authorization to search in this case, therefore, extended beyond the surfaces of the car's interior to the paper bag lying of the car's floor.

Jimeno, supra, 111 S. Ct. at 1804 (citation omitted).

From this language in *Jimeno,* the panel majority here discerned that Kim's consent to allow Agent Small to search his luggage included permission to allow Small to open any sealed container found within the bags because '[c]ans such as those found in Kim's luggage may be thought by a reasonable person to contain drugs." Appendix B, 20a. We submit that this is not a legitimate reading of *Jimeno.*

The *Jimeno* Court contrasted its facts (folded paper bag found on the floorboard of a car) with those in *State v. Wells,* 539 So.2d 464 (Fla. 1989), *aff'd on other grounds,* 495 U.S. 1 (1990), in which the Florida Supreme Court held that consent to search the trunk of a car did not include authorization to pry open a locked briefcase found inside the trunk. The Court noted:

> It is very likely unreasonable to think that a suspect, by consenting to the search of his trunk, has agreed to the breaking open of a locked briefcase within the trunk, but it is otherwise with respect to a closed paper bag.

Jimeno, 111 S. Ct. 1804.

The majority opinion below did not even mention *Jimeno's* reference to *Wells*. The majority was only concerned with whether or not the sealed canisters reasonably could have contained drugs. Appendix B, 21a. This Court surely did not intend *Jimeno* to establish a rule approving the opening of any sealed container found in a traveller's luggage or car without specific consent, merely because the smaller container could reasonably be thought to contain objects sought in the search. If the lower court's reading of *Jimeno* is correct, then the opening of the locked briefcase in *Wells* would have been approved in *Jimeno* because it was surely reasonable to think that the briefcase could contain drugs. But the Court concluded otherwise.

This Court has long recognized that sealed packages can "only be opened and examined under . . . warrant." *Ex parte Jackson*, 96 U.S. 727, 733 (1878). Sealing a package signals a heightened expectation of privacy. *Jimeno* recognized this principle by distinguishing between the folded paper bag in *Jimeno* (which could be opened without obtaining specific consent) and the locked briefcase in *Wells* (which could *not* be opened without obtaining specific consent). *Jimeno*, 111 S.Ct. at 1804. Locking or sealing a package or container must be considered strong evidence of the owner's expectation of security and maintaining the integrity of the package.

An individual's decision to place an object in a particular type of container and seal it in some way demonstrates his desire to keep its contents free from the prying eyes of the public and the police. Here, the canisters had factory-sealed metal lids that revealed nothing of the contents. The panel majority's failure to consider Kim's heightened expectation of privacy in the sealed canisters, other than to say "cans such as found in the case *sub judice* are not similar to locked briefcases" [Appendix B, 21a], is at odds with *Jimeno*. Certiorari should be granted to review the lower court's rule of unlimited consent.

CONCLUSION

Petitioner, Yong Hyon Kim, requests that the Court grant his petition for a writ of certiorari to review the Third Circuit's interpretation of the *Bostick/Mendenhall* "totality of the circumstances" analysis and to consider a realistic refinement of the test for determining what conduct amounts to a seizure by "a show of authority" and prescribe the proper limits of a simple consent to search one's luggage.

Respectfully submitted,

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Dated: October 25, 1994

APPENDIX A — ORDER DENYING PETITION FOR REHEARING DATED JULY 27, 1994

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 93-1726

UNITED STATES OF AMERICA

v.

YONG HYON KIM,

Appellant

SUR PETITION FOR REHEARING

BEFORE: SLOVITER, *Chief Judge;* BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, LEWIS and MC KEE, *Circuit Judges*

The petition for rehearing filed by appellant having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

s/ Robert Cowen
Circuit Judge

Dated: July 27, 1994

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT FILED JUNE 30, 1994

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 93-1726

UNITED STATES OF AMERICA

v.

YONG HYON KIM,

Appellant

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Crim. Action No. 93-00087-01)

Argued: February 15, 1994

Before: BECKER, HUTCHINSON
and COWEN, *Circuit Judges*

(Filed June 30, 1994)

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Appendix B

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Counsel for Appellee

OPINION OF THE COURT

COWEN, *Circuit Judge.*

Yong Hyon Kim ("Kim") appeals from the judgment of conviction and sentence entered on July 19, 1993 by the United States District Court for the Eastern District of Pennsylvania. Kim was convicted in the district court of possessing with intent to distribute six kilograms of methamphetamine in violation of 21 U.S.C. § 841(a)(1) and sentenced to a term of imprisonment of 300 months. Kim contends that the district court erred in denying his motion to suppress evidence of drugs allegedly seized in violation of the Fourth Amendment and in applying a two-level sentencing enhancement for obstruction of justice. As this is an appeal from a final judgment of the district court, we have jurisdiction under 28 U.S.C. § 1291. We reject Kim's arguments and will affirm the conviction and the sentence imposed.

I.

Kim is a thirty-nine-year-old adult male. He was born in Korea but subsequently immigrated with his family to the United States at the age of seventeen. Prior to the occurrence of the events

that gave rise to the indictment against him, Kim had continuously lived in the United States for twelve consecutive years and attended South Philadelphia High School. This background indicates, and Kim does not deny, that Kim understood and spoke English well during his encounter with the police, which is at issue in this appeal.

On August 26, 1992, DEA Special Agent Kevin Small ("Small") observed Kim and his friend, Song Youn ("Youn"), on an Amtrak train when it stopped at the Albuquerque station. This Amtrak train normally travels between Los Angeles and Chicago. It regularly leaves Los Angeles eastbound during the evening, crosses the deserts of Southern California and Arizona during the night, and enters New Mexico the following morning. Shortly after noon, the train makes a scheduled stop in Albuquerque. Law enforcement officials believed that this route was employed by drug dealers to traffick drugs from Los Angeles back to the eastern area. Small, together with other law enforcement officials, was involved in several prior investigations and searches on the train in an effort to interdict drugs.

During a train stop on August 26, 1992, Small, accompanied by Sam Candelaria ("Candelaria"), a local police officer on the DEA task force, went to roomette number 12, occupied by Kim and Youn. A roomette in a sleeper car costs more than a coach seat and affords somewhat more privacy than other accommodations. Roomette 12, however, was located in a busy area of the train. It was only ten feet from the entrance to the sleeper car, next to the luggage storage room, and two feet from a stairwell leading to the upper floor of the sleeper car.

Small knocked on the door to Roomette 12 and Kim opened the door. Youn was inside with Kim. Shortly before this time,

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Small activated a concealed recorder to record any conversation that he may have with the occupants of the roomette. Candelaria was working with Small, but was out of sight, having stationed himself around the corner of the train corridor. Small said in a polite and conversational tone, "How are you guys doing? I'm with the police department." Small bent slightly to show his badge to Kim and Youn who were seated, then knelt in the hallway. At that time Small did not block the doorway or enter the roomette. He remained outside in the hallway in a kneeling position.

Small began to ask several questions, including their point of origin, destination, and place of residence. Kim readily responded to the questions. Small asked if he could see their tickets. Youn produced two tickets in the name of Yong Kim and Terry Park. While Youn was showing the tickets, Small asked how the ride had been. Youn replied, "Real good." Small handed the tickets back to Youn and thanked him. Small then inquired if they had any photo identification. Youn said his name was "Park" and that he had no picture identification with him, while Kim said he had.

At that time, several persons walked past in the train hallway, talking loudly. Candelaria, out of sight to Kim and Youn, waved a piece of paper at Small to inform him that the train reservation was made in the name of "Wonz." Small asked to see the tickets again and handed them back to Youn.

Small asked about Kim and Youn's luggage. He told them that he worked for DEA and that DEA had "problems with people on board trains smuggling drugs out of L.A. back East." He then asked, "You guys don't have drugs in your luggage today, do you?" Kim answered no. Small asked, "Would you voluntarily consent for me to search?" Kim readily replied "Sure." At that time, several persons passed by Roomette 12. Small then pointed to a leather bag

and asked if it was Kim's. Kim answered yes. Youn also offered to move his bags down for Small, but Small stated that he wanted to examine the bags one at a time.

Upon opening the leather bag, Small found six cans of "Naturade All-Natural Vegetable Protein." They appeared to be factory-sealed cans with factory lids which were intact. Small asked what it was and what it was for. Kim replied that it was vegetable protein and that he did not know what it was because he "got it for a present." Small asked where Kim got it. Kim replied, "We bought it in L.A." Small asked Kim if he was sure what the cans contained. Kim did not say anything. Youn answered, "It's closed." Small opened one of the cans and asked Kim who gave them to him. Kim replied, "The guy in L.A." Small asked, "What guy?" There was no answer. Small then handed the can to Candelaria who determined that it contained drugs. The agents then placed Kim and Youn under arrest.

Subsequently it was discovered that Kim made at least two trips to Los Angeles in an apparent attempt to engage in drug trafficking, one in July of 1992, the other in August of 1992 during which he was arrested. Kim was then charged with (1) possessing with the intent to distribute six kilograms of methamphetamine in violation of 21 U.S.C. § 841(a)(1), and (2) conspiracy to distribute methamphetamine in violation of 21 U.S.C. § 846. Before the trial began, Kim made a motion to suppress the drugs uncovered by Small, contending that Kim was unconstitutionally seized during the encounter with Small, and, in any event, his consent to search his luggage did not extend to the sealed cans in the luggage. The district court denied the motion. The jury subsequently convicted Kim of the possession count, but acquitted him of the conspiracy count. On appeal, Kim primarily challenges the denial of his motion to suppress the methamphetamine.

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II.

We first address whether an unconstitutional seizure occurred when Small encountered Kim. In reviewing the decision of the district court, we apply the clear error standard with respect to the factual findings. *See United States v. Coggins*, 986 F.2d 651, 654 (3d Cir. 1993). With respect to the ultimate legal question of whether a seizure occurred, we exercise plenary review. *Id.*

The Fourth Amendment prohibits unreasonable searches and seizures. U.S. Const. amend. IV. The Supreme Court has interpreted this amendment as requiring probable cause for making an arrest, *e.g., Hayes v. Florida*, 470 U.S. 811, 814-16, 105 S. Ct. 1643, 1646 (1985), and reasonable suspicion of criminal activity for making an investigative stop, *Terry v. Ohio*, 392 U.S. 1, 30, 88 S. Ct. 1868, 1884-85 (1968).

With respect to police conduct that falls short of an investigative stop, the Supreme Court has made clear that "a seizure does not occur simply because a police officer approaches an individual and asks a few questions." *Florida v. Bostick*, __ U.S. __, 111 S. Ct. 2382, 2386 (1991). "Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may [a court] conclude that a 'seizure' has occurred." *Id.* (citations and internal quotation marks omitted). When an encounter is consensual, no reasonable suspicion is required.

In a line of cases starting with *United States v. Mendenhall*, 446 U.S. 544, 554-58, 100 S. Ct. 1870, 1877-79 (1980), to *Florida v. Royer*, 460 U.S. 491, 493-508, 103 S. Ct. 1319, 1321-29 (1983) (plurality opinion) and *Michigan v. Chesternut*, 486 U.S. 567, 573, 108 S. Ct. 1975, 1979 (1988), the Supreme Court indicated that "a

seizure occurs when a reasonable person would believe that he or she is not 'free to leave.' " *Bostick*, __ U.S. at __, 111 S. Ct. at 2386. Relying on this language, Bostick, who was questioned by the police in the "cramped confines" of a bus on which he was to travel, argued that he was not free to leave and, thus, was seized. *Id.* at __, 111 S. Ct. at 2384-86.

The Supreme Court clarified in *Bostick* that the "free to leave" language makes sense when police attempt to question a person who is walking down the street or through an airport lobby as in *Royer*, but not when, for reasons unrelated to the police conduct at issue, the defendant is not free to simply walk away. *Id.* at __, 111 S. Ct. at 2387. Individuals may have to stay in their workplace by reason of their employment contract, *INS v. Delgado*, 466 U.S. 210, 218, 104 S. Ct. 1758,1763 (1984), or remain in a seat in the bus that was about to depart, *Bostick*, __ U.S. at __, 111 S. Ct. at 2386. Under these circumstances, the test is whether a reasonable person would feel free "to disregard the police and go about his business," *id.* at __, 111 S. Ct. at 2386, or ultimately "whether a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter," *id.* at __, 111 S. Ct. at 2387, "taking into account all of the circumstances surrounding the encounter," *id.*

The location of the encounter at the roomette on a train brings this case under the rubric of *Bostick*. It is therefore our task to decide whether, under the totality of the circumstances in the case *sub judice*, a reasonable person would have felt free to decline Small's request or otherwise terminate the encounter with him. In our assessment of the encounter, we must accord all factors an appropriate weight rather than treat any one factor as dispositive.

The encounter at issue in this case began with a polite knock at

the door of Kim's roomette. Small was in plain clothes, his gun was not visible, nor did he ever display his gun. When Kim responded by opening the door, Small commenced the conversation by asking politely how Kim and Youn were doing and identifying himself as employed by a police department. Small then requested, "Can I talk to you for a second?" Without hesitation or equivocation, Kim answered, "Yeah." The conversation went forward in a normal conversational tone. Without more, the posture of the encounter indicated that it was purely consensual. Kim, however, argues that several factors made this encounter nonconsensual and a seizure in violation of the Fourth Amendment. We will address these arguments in turn.[1]

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1. Kim relies primarily on two cases of the Court of Appeals for the Tenth Circuit. Those two cases involved encounters somewhat similar to that at issue in this case where a seizure was found in each under a multifactor balancing test. *See generally United States v. Bloom*, 975 F.2d 1447 (10th Cir. 1992); *United States v. Ward*, 961 F.2d 1526 (10th Cir. 1992). The authority of these cases is exaggerated by Kim. In a subsequent case with somewhat similar facts, the Court of Appeals for the Tenth Circuit itself, sitting in banc, appears to have modified *Bloom* and *Ward*. *United States v. Little*, No. 92-2155, 1994 WL 88834, at * 4-5 (10th Cir. Mar. 22, 1994) (in banc). *Little* held that *Bloom* and *Ward* were overruled to the extent they established a *per se* rule that any encounter at a train roomette, without a specific advisement by the officer that the defendant need not answer questions, constituted an unlawful seizure because the location of an encounter is not determinative. *Id.* at * 1, * 4.

Secondly, we note that any persuasive authority of those cases is further reduced in this case, by reason of the inherently fact-oriented, case by case analysis we must conduct. In cases decided before *Bloom* and *Ward*, the Court of Appeals for the D.C. Circuit found no seizure under strikingly similar circumstances. *See, e.g., United States v. Tavolacci*, 895 F.2d 1423, 1424-26 (D.C. Cir. 1990) (encounter at the door of a roomette in a sleeper); *cf. United States v. Savage*, 889 F.2d 1113, 1116-17 (D.C. Cir. 1989) (encounter at the door to a roomette became an investigative stop only after forceful, repeated questioning of Savage). This being the case, we need not specifically reject any of the analysis in *Bloom* and *Ward*, which addressed different encounters with somewhat different factual scenarios.

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Kim argues that a seizure occurred because the encounter was in a confined area in a non-public setting, and because Small blocked the exit. Of course, "[w]here the encounter takes place is one factor, but it is not the only one." *Bostick*, __ U.S. at __, 111 S. Ct. at 2387. Our inquiry is how the location of the encounter contributed to a reasonable person's belief that he was not free to terminate the encounter.

We believe the location of the encounter in this case would contribute little to such a belief. As the Supreme Court pointed out, "an individual may decline an officer's request without fearing prosecution," *id.*, because "a refusal to cooperate, without more, does not furnish the minimal level of objective justification needed for a detention or seizure," *id.* The location in itself does not deprive an individual of his ability to terminate an encounter; he can reject an invitation to talk in a private, as well as a public place.[2] *See also Little*, 1994 WL 88834, at * 3-5.

Nor do we believe a confined area in a train is inherently coercive. Courts have long ago rejected the argument that "the narrowness and confinement of a train compartment are inherently isolationist, hence coercive." *United States v. Brady*, 842 F.2d 1313, 1315 n.5 (D.C. Cir. 1988). *See also United States v. Hoffman*, 964 F.2d 21, 23 n.3 (D.C. Cir. 1992) (cramped conditions alone do not invalidate the otherwise lawful police conduct); *Tavolacci*, 895 F.2d at 1424-26; *Savage*, 889 F.2d at 1116-17.

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2. We note that the district court found the location of the encounter was a public place. Kim argues that it was a private place. We believe the location of the roomette and the bustling hallway, as described in the next two paragraphs in this opinion, indicate that the district court's finding was not clearly erroneous. We do not need to definitively decide the public or private nature of the location in this case, however, because the characterization of the location of the encounter as public or private is not dispositive as to whether the encounter is consensual.

Moreover, the district court found that Small did not in fact block the doorway or exit. Kim argues that the district court's finding is clearly erroneous. We have reviewed the record and conclude that it is not.[3] Small testified that he knew he was "supposed to [leave] enough room for someone to pass by [him]," and that he "was not blocking the door." App. at 91. This testimony was uncontradicted. Moreover, the door was open during the entire encounter. The roomette was in a well-trafficked area, only ten feet from the entrance to the sleeper car, next to the luggage storage room, and two feet from a stairwell leading to the upper floor of the sleeper car. Voices of the passersby could occasionally be heard on the tape. Directly across from Kim's roomette was the train conductor's room. The door to that room was open and the conductor was in his room during the relevant time period. The conductor passed by in front of Kim's roomette several times to speak to passengers in the hallway. Kim could see the conductor and passengers. Close to Kim's roomette on the same hallway was a large family room occupied by four or five people. Passengers inside that room watched and heard the encounter. Finally, the door to Kim's roomette was a sliding door, which Kim could have easily closed if he wanted to terminate the conversation.

Kim argues that these facts notwithstanding, a reasonable person would not feel free to decline to answer Small's questions

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3. We disagree with the dissent's contrary conclusion. While Kim testified that Small leaned "on the side of the door" or in the doorway, that testimony, even if taken as true, did not contradict the fact that Kim did not *block* the doorway. Leaning on the side of a door is not the same as blocking the doorway. Kim did not say that Small crossed the threshold or leaned inside the Roomette. *See* Dissent Typescript at 32 (Small did not lean "into the compartment."). Even if Kim had said that Small blocked the doorway, we would still have to uphold the finding of the district court who is in a better position to evaluate the testimony of the witnesses and may have made its decision based on the credibility of the witnesses.

or to shut the door, because "[i]t doesn't take much intelligence for a reasonable person to believe that shutting the door in the face of such an intruder would be to invite more serious intrusion." Reply Brief for Appellant at 2. We disagree. As the Supreme Court stated, "an individual may decline an officer's request without fearing prosecution." *Bostick*, __ U.S. at __, 111 S. Ct. at 2387. We hold that under the facts of this case, a reasonable person would have felt free to decline to speak or to terminate his conversation with Agent Small. *See id.*

Kim next argues that he had a higher expectation of privacy because he was traveling in a private sleeping compartment and that a reasonable person would see his roomette as a safe haven, different from the public coach areas of a train. While we recognize the differences between a roomette in a sleeper car and a seat in the coach area, we do not believe that Kim's expectation of privacy has any overriding importance in our analysis as to whether a seizure occurred. Expectation of privacy is significant in the analysis of *whether consent or probable cause is required for making a search, see, e.g., Ex parte Jackson*, 96 U.S. 727 (1878); *Katz v. United States*, 389 U.S. 347, 88 S. Ct. 507 (1967). It sheds no light on *what is consent or a consensual encounter.* As far as consent is concerned, one may consent to an encounter in the privacy of his own home or in a public square. *See Katz*, 389 U.S. at 351, 88 S. Ct. at 511 ("What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection."); *Lewis v. United States*, 385 U.S. 206, 87 S. Ct. 424 (1966) (defendant waived his right to privacy in his home by inviting an undercover agent inside). The high expectation of privacy, alone, will not destroy the otherwise consensual nature of the encounter.[4] *See Little*, 1994 WL 88834, at * 5 ("expectation of privacy has only a limited relevance").

4. Kim's argument based on higher expectation of privacy appears to be a (Cont'd)

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Kim contends that Small asked focused and potentially incriminating questions. When asked such questions, Kim argues, "an innocent passenger may well feel obligated to demonstrate innocence by cooperation," Brief for Appellant at 28, and "a guilty passenger must feel terrorized and trapped," *id.* Kim points to a question that Small asked: "You guys don't have drugs in your luggage today, do you?" First, we do not believe this question was accusational. The tone of the question in no way implied that Small accused or believed that Kim had drugs in his possession; it was merely an inquiry.

Secondly, what a guilty passenger would feel and how he would react are irrelevant to our analysis because "the 'reasonable person' test presupposes an *innocent* person." *Bostick*, __ U.S. at __, 111 S. Ct. at 2388. We do not believe an innocent person would feel compelled to cooperate with police by some potentially incriminating questions. In any event, potentially incriminating questions are permissible. As the Supreme Court stated in *Bostick:*

> The dissent reserves its strongest criticism for the proposition that police officers can approach individuals as to whom they have no reasonable suspicion and ask them potentially incriminating questions. But this proposition is by no means novel; it has been endorsed by the Court any number of times. *Terry, Royer, Rodriguez,* and *Delgado* are just a few examples. As we have explained, today's decision follows logically from those decisions

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(Cont'd)
restatement of his argument based on the location of the encounter, which we have rejected above. Such a factor, as we stated, is at most but one factor in our balancing analysis.

> and breaks no new ground. Unless the dissent advocates overruling a long unbroken line of decisions dating back more than 20 years, its criticism is not well taken.

Id. See also Little, 1994 WL 88834, at 6 ("The asking of 'incriminating questions' is irrelevant to the totality of the circumstances surrounding the encounter.").[5]

We therefore hold that potentially incriminating questions do not by themselves make an encounter coercive. In so ruling, we note that Kim cites to only one question, Brief for Appellant at 28, and thus the case does not present the scenario of repeated and persistent questioning of an individual, which was found to constitute an investigative stop in *United States v. Savage*, 889 F.2d 1113, 1117-18 (D.C. Cir. 1989).

Kim next argues that Small asked his questions in a "blunt" and "direct" manner which contributed to the coerciveness of the encounter. We disagree. The district court found that Small's tone was polite and conversational. After reading the transcripts of the questions and listening to the tapes ourselves, we agree with the district court. Such a tone would not cause a reasonable person to believe that he was not free to terminate the encounter.

Conceding that Small spoke smoothly and politely, Kim focuses on "the *type* of questions that the agent asked, rather than their delivery." Brief for Appellant at 28-29. Kim argues that the

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5. The dissent cites to several cases decided in or before 1990 prior to *Bostick* (1991) for a position contrary to the *Bostick* language as quoted here. Those cases also conflicted with *Little*. We follow the Supreme Court language, and not the cases cited by the dissent. *See* Dissent Typescript at 33-35.

questions themselves conveyed the message that Kim and Youn were being accused of carrying drugs. We do not read the questions themselves as indicating any *accusation* of drug possession. To the extent that Kim's argument rests on the types of questions asked, it is a recharacterization of his argument that the encounter was a seizure because he was asked "potentially incriminating questions," which we have already rejected.

Kim also bases his seizure theory on the fact that Small failed to advise Kim of his right to decline the Agent's requests or terminate the encounter. While such advice may well be evidence of the consensual nature of an encounter following the advice, the absence of such advice does not necessarily eliminate the consensual nature of the encounter. As the Supreme Court stated, "[w]hile most citizens will respond to a police request, the fact that people do so, and do so without being told they are free not to respond, hardly eliminates the consensual nature of the response." *Delgado,* 466 U.S. at 216, 104 S. Ct. at 1762-63. A reasonable person is presumed to know of his right not to answer questions without fear of prosecution. *See Bostick,* __ U.S. at __, 111 S. Ct. at 2387. Courts have clearly rejected the "attempt to Mirandize [F]ourth [A]mendment consents." *United States v. Kikumura,* 918 F.2d 1084, 1093 (3d Cir. 1990) (citing *Schneckloth v. Bustamonte,* 412 U.S. 218, 227, 93 S. Ct. 2041, 2047 (1973)). As a result, we believe that the failure to advise Kim of his right to terminate the conversation itself did not make the encounter unconstitutional.

To the extent that the number of police officers and the individuals present during the encounter has any relevance to our analysis, as the court believed in *Bloom,* 975 F.2d at 1454 (two agents versus one private citizen), and in *Ward,* 961 F.2d at 1531-32 (defendant was alone), we hold that this factor militates in favor of the government in this case. During the entire encounter. Small

appeared to Kim to be alone, while Kim was accompanied by his friend Youn who was present with him. Another police officer was out of sight to both Kim and Youn.

For the foregoing reasons, we reject Kim's contentions. After reading the transcript of the conversation between Kim and Small, and listening to the tone of the tape recording of that conversation, we believe the encounter was not coercive. The totality of the circumstances demonstrates that Kim voluntarily answered Small's questions, and was cooperative during the entire encounter.[6] Furthermore, we cannot say the district court's finding that Agent Small did not block the doorway during questioning is clearly erroneous. We therefore conclude that the encounter was consensual and did not produce tainted fruit inadmissible at trial.

III.

Kim contends that his encounter with the police was a seizure and therefore his consent to search was tainted by that seizure. Brief for Appellant at 35-37. As we conclude that Kim was not seized during the encounter, Kim's contention of taint naturally fails. Still, we feel it appropriate to examine separately whether the district court erred in finding that Kim voluntarily consented to the search of Kim's luggage. The district court's determination of consent to search the luggage is a finding of fact, *see Schneckloth,*

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6. The dissent faults us for analyzing several factors in isolation. To the contrary, we base our conclusion that the encounter was voluntary on all of the circumstances surrounding the encounter including Small's manner and tone and Kim's voluntary responses to Small. The dissent itself describes a typical Small encounter as follows: "[S]mall makes no threats. His tone is polite and conversational. He does not show a gun. He behaves much like a door-to-door salesman who can keep his foot in the door and the prospect talking until he has made a sale (or in Small's business, an arrest)." Dissent Typescript at 27-28 n.1.

412 U.S. at 227, 93 S. Ct. at 2047-48, and is subject only to clearly erroneous review. *See, e.g., Kikumura,* 918 F.2d at 1093. We find no clear error in this case.

It is well settled that the government may undertake a search without a warrant or probable cause if an individual consents to the search, and any evidence discovered during such a search may be seized and admitted at trial. *Schneckloth,* 412 U.S. at 219, 93 S. Ct. at 2043-44 (1973). Our task is to decide whether Kim consented to the search of his luggage.

As the Supreme Court instructed, "[w]hen a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the burden of proving that the consent was, in fact, freely and voluntarily given." *Schneckloth,* 412 U.S. at 222, 93 S. Ct. at 2045 (internal quotation marks and citations omitted). "[W]hether a consent to a search was in fact 'voluntary' or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances" *Id.* at 227, 93 S. Ct. at 2047-48. Thus whether consent was given is to be resolved by examining all relevant factors, without giving dispositive effect to any single criterion. Certain factors that courts consider in determining whether confessions were voluntary, such as the age of the accused, his education, his intelligence, whether he was advised of his constitutional rights, and whether the questioning was repeated and prolonged, *id.* at 226, 93 S. Ct. at 2047, are relevant to our examination. *See United States v. Velasquez,* 885 F.2d 1076, 1081-83 (3d Cir. 1989), *cert. denied,* 494 U.S. 1017, 110 S. Ct. 1321 (1990).

While not giving an exhaustive list of relevant factors, the Supreme Court in *Schneckloth* did teach that "[w]hile knowledge of the right to refuse consent is one factor to be taken into account,

the government need not establish such knowledge as the *sine qua non* of an effective consent." *Schneckloth,* 412 U.S. at 227, 93 S. Ct. at 2048. Nor is the government required to advise the defendant of his right to refuse consent before eliciting his consent. *Id.* at 231-34, 93 S. Ct. at 2049-51.

Applying these principles to the case *sub judice,* we hold that the district court did not clearly err in finding that Kim consented to the search of his luggage. The tape recording of the conversation between Small and Kim and the transcript of that recording indicate Kim spoke English well and answered Small's questions without hesitation. Kim had been a permanent resident alien in the United States for over twelve years and attended high school in Philadelphia.

Most important, when Small asked if Kim would voluntarily consent to a search of his luggage, Kim readily responded, "sure." App. at 34. During the entire short conversation, Kim was cooperative. He readily confirmed to Small the identity of his luggage. Kim's demeanor was no doubt a strong indication of voluntariness. Even his travel companion Song Youn testified that Kim was not at all reluctant to permit Small to search his luggage, and that Kim readily consented to the search. App. at 304.

Moreover, the whole encounter was short, lasting only several minutes. There was no threat of force against Kim. Small was the only officer visible to Kim and Youn. Nor was the atmosphere coercive. Small was polite and his tone was courteous and conversational. There was no repeated and prolonged questioning. Nor did Small ask Kim direct, probing, or incriminating questions. During the entire period, Small mentioned only that he was looking for illegal drugs. That was not a probing or incriminating question; it was meant to inform Kim or Small's mission and the scope of his

search so as not to mislead Kim. In any event, such questioning alone is not dispositive under a totality of circumstances analysis. It certainly does not outweigh the overwhelming evidence of voluntariness as analyzed above. Nor do we believe it significant that Kim was not advised of his right to refuse consent, particularly in the face of strong evidence of voluntariness. *See Schneckloth,* 412 U.S. at 227-33, 93 S. Ct. at 2048-50; *Kikumura,* 918 F.2d at 1093.

For the foregoing reasons, we conclude that the district court was correct in finding that Kim voluntarily consented to the search of his luggage.

IV.

Kim also contends that his consent to the search of his luggage did not extend to the search of the sealed containers within one of his bags, and therefore the drugs found in those containers are inadmissible. We reject this argument.

It is clear that "[w]hen an official search is properly authorized — whether by consent or by the issuance of a valid warrant — the scope of the search is limited by the terms of its authorization." *Walter v. United States,* 447 U.S. 649, 656, 100 S. Ct. 2395, 2401 (1980). "The standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of 'objective' reasonableness — what would the typical reasonable person have understood by the exchange between the officer and the suspect?" *Florida v. Jimeno,* __ U.S. __, __, 111 S. Ct. 1801, 1803-04 (1991). Applied to the case *sub judice,* the inquiry is whether a reasonable person would have understood the exchange between Small and Kim as indicating that Kim's authorization to search his luggage for drugs included permission to search the sealed cans placed inside his luggage.

We therefore examine the exchange between Small and Kim to determine what a reasonable person would understand the scope of the consent to be. Before starting the search, Small informed Kim and his friend Sung Youn that he worked for DEA and was looking for illegal drugs, and asked if they had any drugs in their luggage. After that Small asked him, "Would you voluntarily consent for me to search?' App. at 34. Kim responded, "Sure." *Id.* Kim then identified one of his bags for Small. Upon opening the bag, Small discovered some cans. Small asked what was in the cans and what it was for. Kim said nothing. Young said, "It's closed," and repeated it. App. at 35. Small proceeded to open the can and Agent Candelaria subsequently determined that the cans contained methamphetamine. Kim and Youn were then arrested.

We conclude that a reasonable person would understand Kim's authorization for a search of his luggage to include permission to search any items found inside his luggage. Common sense supports this understanding. Small indicated that he was looking for illegal drugs, and his search target was the luggage. Kim gave his permission for Small to search his luggage for drugs. Cans such as those found in Kim's luggage may be thought by a reasonable person to contain drugs. Thus the permission to search the luggage covered the cans found in that luggage.

The ruling of the Supreme Court in *Jimeno*, __ U.S. at __, 111 S. Ct. at 1803-04, a case analogous to the one before us, lends support to our conclusion. In *Jimeno*, the Supreme Court held that "it was objectively reasonable for the police to conclude that the general consent to search respondent's car included consent to search containers within that car which might bear drugs. A reasonable person may be expected to know that narcotics are generally carried in some form of a container." *Id.* at 1804.

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Kim attempts to distinguish this case from *Jimeno* by pointing out that the search was conducted around a sleeping compartment on a train rather than in a car as in *Jimeno,* and that the drugs in this case were contained in sealed cans rather than in a bag simply folded as in *Jimeno,* We conclude that these distinctions do not defeat the principle underlying the *Jimeno* ruling that when one gives general permission to search for drugs in a confined area, that permission extends to any items within that area that a reasonable person would believe to contain drugs.

We believe that the place where the encounter took place is not significant because it did not operate to coerce Kim, as we have analyzed above, to give his general permission to search his luggage. Moreover, the distinction between the sealed cans in this case and the folded bags in *Jimeno* does not mandate a different result because they both are what a reasonable person would believe could function as drug containers. To repeat the language of the Supreme Court, "a reasonable person may be expected to know that narcotics are generally carried in some form of a container." *Id.*

We note that the Supreme Court indicated that "[i]t is very likely unreasonable to think that a suspect, by consenting to the search of his trunk, has agreed to the breaking open of a locked briefcase within the trunk." *Id.* However, cans such as those found in the case *sub judice* are not similar to locked briefcases. We therefore reject the argument based on the above language of the Supreme Court addressing a different matter. We draw support from *United States v. Springs,* 936 F.2d 1330, 1334-35 (D.C. Cir. 1991), where the court upheld the search of a *sealed* baby powder container. The court there rejected an argument almost identical to Kim's:

> the evidence supports a view that the opening of the baby powder container did not depend upon possession of a key, knowledge of a combination, or anything other than merely removing its lid. Neither did the fact of its opening render it useless, anymore than the opening of the folds destroyed the usefulness of the paper bag in *Jimeno.*

Id. at 1334-35. The same scenario occurred in this case and we follow the reasoning of *Springs.*

Finally, Kim contends that after Small obtained general permission to search Kim's luggage, he should have also asked for specific permission to search each bag and, more importantly, for permission to open the cans when Small discovered them in Kim's luggage.[7] Such an argument for more explicit and specific

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7. Upon opening the bag, Small discovered some cans. The following colloquy ensued:

SMALL:	What is this stuff?
KIM:	Vegetable protein.
SMALL:	What do you use it for?
KIM:	I don't know. I got it for—
YOUN:	For health.
KIM:	—a present.
SMALL:	A present? A present! Who gave it to you, you know?
KIM:	We bought it in L.A. Coffee, and these.
SMALL:	Okay. You're sure that's what's inside one of these?
YOUN:	It's closed.
SMALL:	Huh?
YOUN:	It's closed.
SMALL:	It's closed?

App. at 34-35.

authorization has been rejected by the Supreme Court in *Jimeno.* The Court stated that if a suspect's consent "would reasonably be understood to extend to a particular container, the Fourth Amendment provides no grounds for requiring a more explicit authorization." *Jimeno,* __ U.S. at __, 111 S. Ct. at 1804.

We have already concluded above that Kim's consent to search his luggage for drugs extended to the cans in the luggage. Of course Kim could have limited his consent to certain items, but he had the burden to express that limitation, *id.,* which he did not do. Kim readily gave his general consent to the search, without hesitation or limitation. Even Youn subsequently testified that Kim was not at all reluctant to permit Small to search his bags. App. at 304.

The fact that Youn said, "It's closed," App. at 35, does not help Kim. It is worth emphasizing that Youn, not Kim, said those words. Kim, who gave general authorization to search and readily identified his own luggage for Small, said nothing. Therefore, it was reasonable for Small to conclude that Kim, who bore the burden to limit his own permission, did not attempt to impose any limitations on his general permission. After all, Youn, who was not Kim's guardian, would not be considered by a reasonable person to be able to legally limit Kim's consent.

More important, Youn's words would not be understood by a reasonable person as a limitation on Kim's consent because Youn spoke those words not in an attempt to limit the search, but rather in response to Small's question, "You're sure that's what's inside one of these?" *Id.* Youn's answer was another way of saying, "I don't know because it is closed." Accordingly, Kim did not limit his general consent to search to any specific items. For the foregoing reasons, we hold that it was reasonable for Small to conclude that Kim's consent to search extended to the cans found in his luggage.

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V.

Finally, Kim argues that the district court erred in upwardly adjusting his sentence by applying a two-level enhancement for obstruction of justice, pursuant to U.S.S.G. § 3C1.1. That provision mandates a two-level enhancement "[I]f the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the investigation, prosecution, or sentencing of the instant offense." U.S.S.G. § 3C1.1. This provision applies to false statements made during a defendant's cooperation with law enforcement authorities. *See, e.g., United States v. Banks,* 964 F.2d 687, 693 (7th Cir.)., *cert. denied,* __ U.S. __, 113 S. Ct. 470 (1992).

The facts that led the district court to make the two level upward adjustment essentially related to Kim's conduct during his cooperation with the government. Shortly after he was arrested, Kim decided to cooperate with DEA. Deliberately concealing his first trip to Los Angeles in July 1992, Kim told the agents that the August 1992 trip during which he was arrested was his only trip to Los Angeles. He further informed the DEA agents that he had been asked to bring the cans back to Philadelphia as a gift, and that someone was supposed to meet him at the train station or to pick them up at his house. He offered to assist DEA to deliver the methamphetamine to the intended recipient in Philadelphia. The DEA agents attempted to stage a controlled delivery by placing Kim back in the original train. No one showed up to meet Kim. The evidence revealed that by that time Kim had already called his employer's home to inform them of his arrest and his cooperation with DEA. Based on these facts, Kim claims that there is no evidence of willful obstruction. Furthermore, Kim argues even if there was obstruction, it did not relate to the "instant offense," possession of methamphetamine with the intent to distribute, of

which he was convicted, but related solely to the conspiracy charge of which he was acquitted.

We exercise plenary review over the district court's interpretation and application of the Sentencing Guidelines. *United States v. Belletiere,* 971 F.2d 961, 964 (3d Cir. 1992). We review the factual findings of the district court for clear error, *id.,* and "where the district court's finding involves a mixed question of law and fact, our standard and scope of review takes on greater scrutiny, approaching *de novo* review as the issue moves from one of strictly fact to one of strictly law." *Id.* (internal quotation marks omitted).

We first address the threshold question of whether the facts that the district court relied upon to apply the upward adjustment related to the "instant offense" within the meaning of the Guidelines. The language of the guideline indicates that "instant offense" refers to the particular offense of which the defendant was convicted of. "Any interpretation other that § 3C1.1 refers to efforts to obstruct the prosecution of the conviction offense would only render this modifier meaningless." *United States v. Perdomo,* 927 F.2d 111, 118 (2d Cir. 1991), *quoted in Belletiere,* 971 F.2d at 967. *Accord, e.g., United States v. Barry,* 938 F.2d 1327, 1333 (D.C. Cir. 1991). Furthermore, the Sentencing Commission's own interpretation supports this reading of the guideline. As we pointed out, "[t]he commentary to section 3C1.1 makes it clear that the section's focus is on willful acts or statements intended to obstruct or impede the government's investigation of the offense at issue." *Belletiere,* 971 F.2d at 968. Accordingly, in order for the district court to apply a two-level upward adjustment, the facts showing Kim's obstruction must relate to the offense of possessing methamphetamine with the intent to distribute, of which he was convicted, or its investigation, prosecution, or sentencing.

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Kim contends that the facts that arguably constituted obstruction of justice at most pertained only to the conspiracy count of which he was acquitted, rather than the possession count. His argument is that the possession offense was complete in Albuquerque because "[t]he government took the drugs and Kim's possession ended." Brief for Appellant at 48. His allegedly false cooperation with the government was useful only to catch certain third parties, so the argument goes, and was included solely in the charged conspiracy of which he was acquitted.

We disagree. While it is clear that Kim's false cooperation related to the conspiracy charge, that fact alone does not necessarily demonstrate that his conduct could not also relate to the possession count. Viewing the indictment and the facts as a whole, we conclude that Kim's false cooperation related to the possession charge of which Kim was convicted. The possession offense may well have stopped when the government took the drugs from Kim. But the "investigation, prosecution, or sentencing" of that offense did not stop at that point.

The possession offense of which Kim was charged and convicted has three elements: (1) Kim's possession of six kilograms of the methamphetamine; (2) his knowledge that the substance he possessed was a controlled substance; and (3) his intent to distribute the controlled substance. *See* 21 U.S.C. § 841(a)(1). The government had the burden of proving every element beyond a reasonable doubt. In order to carry that burden, the government must conclude a thorough investigation of every fact that related to those three elements. The government's investigation of other participants in the scheme directly bore upon two elements of the offense: Kim's knowledge that the substance in the cans was a controlled substance and his intent to distribute.

In particular, Kim's material misstatements about other participants and his trip to California in July of 1992 related to his knowledge of methamphetamine in the cans. In order to prove Kim's knowledge, the government may have needed to prove how the methamphetamine came into Kim's possession and, thus, needed accurate information regarding the events preceding the encounter in front of the train roomette on August 26, 1992. The evidence shows that Kim deliberately provided false and inaccurate information with respect to his contact and his trip to Los Angeles in July of 1992.

To prove the intent to distribute element, the government may have needed to identify who was waiting for the methamphetamine. Kim deliberately called the home of his employer Kenneth Lee (also known as Kwang Suk Yi), warning him of his cooperation with the government, thus tipping off the intended recipient of the methamphetamine. Of course, this obstructed the government's investigation of the intent element: no one actually showed up to receive the methamphetamine from Kim. Accordingly, the facts upon which the district court based the two-level enhancement were intimately related to investigation and prosecution of two elements of the possession offense and therefore related to the "instant offense" within the meaning of U.S.S.G. § 3C1.1.

We next address the issue of whether there is evidence of willful obstruction. The language of § 3C1.1 plainly requires that upward adjustment be based only on willful obstruction of justice. Willful obstruction includes "providing a materially false statement to a law enforcement officer that significantly obstructed or impeded the official investigation or prosecution of the instant offense." *Id.* comment. (n.3(g)).

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Willfulness denotes "an act which is intentional rather than accidental." *Belletiere*, 971 F.2d at 965 (internal quotation marks omitted). In the context of applying § 3C1.1 in a sentencing determination, the evidence must show that the defendant "*intentionally* obstructed or attempted to obstruct justice." *Id.* Since the government sought to upwardly adjust Kim's sentence, it bore the burden of proving by a preponderance of the evidence that Kim wilfully obstructed or attempted to obstruct justice. *Id.*

Kim argues that the district court erred in failing to make a specific factual finding of willful obstruction, which failure warrants a remand. We read the record differently. During the sentencing hearing, the district court specifically stated that the court imposed the sentence on Kim for his serious criminal conduct and his "subsequent misleading of the Government's investigation by not telling the truth or appearing to help them [sic] when he, in fact, was not doing this." App. at 612. This language indicates that the district court found that Kim intentionally misled the government in order to thwart the investigation. Read in the context of the sentencing hearing, and coupled with the evidence of Kim's false cooperation and misstatements in the record, the district court's statement more than constituted a finding of willful obstruction of justice.

Kim next argues that there was no evidence to support the finding of the district court. We disagree. The district court made its finding of Kim's misleading the government's investigation only after reviewing the pre-sentencing report and hearing arguments from both parties. *See* App. at 589-612. The record reflects that the government proved Kim's deliberate false statements to the government agents. The district court certainly did not clearly err.

First, Kim deliberately concealed his first trip to Los Angeles

in July of 1992 when the methamphetamine shipment was due. Kim admitted to lying about his trip in order to shift the focus of the government investigation away from him. App. at 382. Kim also deliberately misled the government about the identity of the individual who delivered to him the cans containing the methamphetamine. As mentioned above, these falsehoods directly related to and impeded the investigation of one of the elements of the possession count: Kim's knowledge of the controlled substance contained in the cans.

Second, the record also supports the finding of the district court that Kim deliberately misled the government's investigation as to who would be the intended recipient of the cans of methamphetamine which directly related to the intent to distribute element of Kim's possession charge. Kim contends that there was no direct evidence that Kim willfully obstructed the investigation. The district court, however, indicated that it could infer willfulness from the course of Kim's conduct during the sham cooperation. App. at 593. We have reviewed the record and conclude that the district court's inference was not clear error.

The record reveals that Kim made several misrepresentations to the government agents during the course of his alleged cooperation with the government in order to assist the government in catching the intended recipient of the drug. He misled the agents into believing that he would assist them in effecting a controlled delivery in Philadelphia. On the pretext of calling his home to find out whether his wife had given birth to their child, Kim called Lee and informed Lee's wife that he was cooperating with DEA, knowing that this would tip off the intended recipient. In his subsequent testimony, Kim conceded that because of this disclosure, "everybody" knew about the situation. App. at 390.

Kim first told the agents that the recipient would come to the train station or his home. But at the last minute while staying at a hotel with the agents, he changed his story. Then Kim said that the recipient would contact him through a beeper, which was at his home. Kim then called his home and asked his brother-in-law to bring his beeper for him to use. Shortly afterwards, his brother-in-law, accompanied by Kenneth Lee, brought the beeper to the hotel room. Kim told the agents that Lee spoke only Korean (when he in fact spoke English) and proceeded to speak with him in Korean which the agents did not understand. Subsequently no one showed up to pick up the cans of methamphetamine.

From this factual scenario, the district court was entitled, we conclude, to find that Kim intentionally obstructed the government's investigation of the intended recipient of the methamphetamine which related to Kim's intent to distribute the drug. The district court found that Kim probably manipulated the timing of his story of the pager to bring Lee to the hotel in order to assure him that Kim was acting as if he was cooperating, but in fact was not. Clearly if Kim simply wanted the beeper, he could have asked his brother-in-law to bring it to the hotel, alone, without enlisting the help of Lee. Although there was no direct evidence of the conversation between Lee and Kim, the district court's inference was not clearly erroneous.

We are aware of the commentary to U.S.S.G. § 3C1.1 stating that "testimony or statements should be evaluated in a light most favorable to the defendant." U.S.S.G. § 3C1.1, comment. (n.1). Nonetheless, we conclude that the entire course of conduct of Kim's false cooperation with the government amply supports the finding of the district court. In this context, we must bear in mind that the government's burden is not to prove its position beyond a reasonable doubt, but only by a preponderance of the evidence. *Belletiere*, 971 F.2d at 965.

Kim finally contends that he called Lee not to tip off the intended recipient, but to pay "the courtesy of a telephone call," Brief for Appellant at 46, to his employer. He asserts this was "within the norm for a defendant who has just been arrested and has made an important decision to assist the government," *id.* With this argument, Kim attempts to explain away his willfulness to impede the investigation.

We reject this version of what occurred. The district court believed, and we agree, that a truly cooperating defendant would not undermine the cooperation. Although it may be reasonable for a defendant to inform his family and employer that he will not be home as scheduled, it was not necessary for Kim to disclose that he was cooperating with the government. He had several other options. Instead, he chose to call his employer under the pretext of calling his wife to inquire about the birth of their child. Had he been forthright about calling his employer, the agents may have attempted to stop him. More important, Kim disclosed in the phone call that he was cooperating with the government, *knowing* that the information would be made known to others. Kim must have known that the effect of his call would be to tip off the intended recipient of the drugs of the danger of being caught if he came to meet Kim. These facts rendered Kim's explanation not credible. The district court did not clearly err in inferring that Kim willfully impeded the investigation.

Accordingly, we conclude that Kim willfully obstructed the investigation and prosecution of the instant offense within the meaning of U.S.S.G. § 3C1.1 and that the district court's finding of willful obstruction is supported by the record. The district court did not err in applying a two-level upward adjustment in Kim's sentence for obstruction of justice.

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VI.

For the foregoing reasons, we will affirm in all respects the judgment of conviction and sentence entered by the district court.

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BECKER, *Circuit Judge*, dissenting.

This appeal presents two discrete Fourth Amendment issues. They are both close but, with all respect, I believe that the majority has gotten them both wrong. First, I believe that the facts taken as a whole show that a reasonable person in defendant Kim's position would not have felt free to terminate the encounter and hence that there was a seizure. More specifically, a seizure occurred because Agent Small confronted Kim in a non-public part of the train, blocked Kim's exit from the roomette, asked Kim focused and incriminating questions, and never advised Kim that he had a right to terminate the encounter. As I see it, at the time Small asked Kim whether he had drugs in his luggage, Small had seized him. And since Small had no reasonable suspicion at the time he detained Kim, the consent Kim gave to search his luggage was involuntary. Second, I think that even if the majority is right that Small had not seized Kim and that Kim's consent to the search of his luggage was thus voluntary, Small exceeded the scope of Kim's consent when he opened one of the sealed Naturade All-Natural Vegetable Protein canisters he found in Kim's luggage. I would therefore hold that the motion to suppress should have been granted and that the convictions should be overturned.

I. THE SEIZURE

I agree with the majority that the seizure question in this case falls under the rule of *Florida v. Bostick*, 501 U.S. 429, 111 S. Ct. 2382 (1991), which tells us that a person has been seized if, under the totality of the circumstances, a "reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter." 111 S. Ct. at 2387.[1] A review of the circumstances

1. The encounter between Kim and Small occurred in a sleeper car on an AMTRAK train called the "Southwest Chief," which travels between Los Angeles (Cont'd)

surrounding the encounter between Small and Kim, however, shows that a reasonable person would not have felt free to terminate the encounter.

To begin with, the encounter occurred in a train roomette, a non-public setting. The non-public nature of the setting is a factor that weighs in favor of a conclusion that a seizure occurred because

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(Cont'd)
and Chicago. Agent Small (along with Officer Candelaria) has become something of a legend among the district judges in New Mexico and the appellate judges in the Tenth Circuit. His drug interdiction efforts at the Albuquerque train station have singlehandedly spawned an entire jurisprudence about searches and seizures on trains. No fewer than nine published opinions in that circuit, including an *en banc* opinion, grapple with the Fourth Amendment issues raised by his actions. *See United States v. Moore*, 1994 WL 131523 (10th Cir. April 18, 1994); *United States v. Little*, 18 F.3d 1499 (10th Cir. 1994) (*en banc*); *United States v. Zapata*, 997 F.2d 751 (10th Cir. 1993); *United States v. Hall*, 978 F.2d 616 (10th Cir. 1992); *United States v. Bloom*, 975 F.2d 1447 (10th Cir. 1992); *United States v. Ward*, 961 F.2d 1526 (10th Cir. 1992); *United States v. Scales*, 903 F.2d 765 (10th Cir. 1990); *United States v. Miller*, 811 F. Supp. 1485 (D.N.M. 1993); *United States v. Armijo*, 781 F. Supp. 1551 (D.N.M. 1991).

Based on these reported cases, Small's method of operation is distinctive and apparently always essentially the same. Before the "Southwest Chief" stops in Albuquerque during its run between Los Angeles and Chicago, he reviews the train manifest looking for passengers travelling in sleeping cars on one-way tickets paid for with cash. When he finds such a passenger, he knocks on the passenger's roomette door, stands in the doorway and begins a carefully constructed inquisition that quickly leads to the question "Would you voluntarily consent for me to search." He makes no threats. His tone is polite and conversational. He does not show a gun. He behaves much like a door-to-door salesman who can keep his foot in the door and the prospect talking until he has made a sale (or, in Small's business, an arrest). He is an enormously capable and highly successful police officer. But his arrests have not always been upheld against Fourth Amendment challenge and, at all events, we must analyze the facts of this case on their own.

police conduct in non-public areas tends to be more coercive. *See United States v. Ward*, 961 F.2d 1526, 1531 (10th Cir. 1992) (stating that "whether an encounter occurs in the public view is particularly significant" to the question of whether a seizure occurred). *See also Berkemer v. McCarty*, 468 U.S. 420, 438, 104 S. Ct. 3138, 3149 (1984) (expressly recognizing the importance of an encounter occurring in a public place).[2]

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2. The majority opinion in the recent Tenth Circuit *en banc* case discussing Small, *United States v. Little*, 18 F.3d 1499 (10th Cir. 1994) (*en banc*), questioned the assumption that a non-public encounter makes the police conduct more coercive than when it occurs in a public setting. *Id.* at 1504 & n.5. It stated, not unpersuasively, that many people may in fact feel more coerced when they are confronted in a public setting and may submit to police requests because they do not want to make a spectacle of themselves. *Id.*

Although the *Little* majority's view on this question has intuitive appeal, it does not appear to be in accord with the view of the Supreme Court. As Judge Logan pointed out in dissent in *Little*, the Supreme Court has explicitly stated in the context of giving *Miranda* warnings that public settings are inherently less coercive. *Little*, 18 F.3d at 1511 (Logan, J. dissenting) (quoting *Berkemer*, 468 U.S. at 438, 104 S.Ct. at 3149). In *Berkemer*, the Supreme Court said:

> [t]he typical traffic stop is public, at least to some degree. Passersby, on foot or in other cars, witness the interaction of officer and motorist. This exposure to public view both reduces the ability of an unscrupulous policemen to use illegitimate means to elicit self-incriminating statements and diminishes the motorists fear that, if he does not cooperate, he will be subjected to abuse.

468 U.S. at 438, 104 S. Ct. at 3149. Until the Supreme Court states otherwise, therefore, we must operate under the assumption that encounters with the police in non-public settings are inherently more coercive.

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The district court's finding that the setting was public was, in my opinion, clearly erroneous. Although someone renting a roomette probably does not have the same expectation of privacy as someone sitting in his or her home, a roomette passenger's expectation of privacy is certainly much higher than a coach passenger's. In my view, the privacy expectation is quite similar to that of an individual who has rented a hotel room, and it is well settled that a hotel room is a non-public place. *See Stoner v. California*, 376 U.S. 483, 489-90, 84 S. Ct. 889, 893 (1964) (according full Fourth Amendment protection to hotel guests); *Eng Fung Jem v. United States*, 281 F.2d 803, 805 (9th Cir. 1960) ("The transience of appellant's stay in the [hotel] room searched by the officers does not dilute the force of constitutional protection. The hotel room in question was appellant's dwelling. That he lived there for but several days is of no consequence.").

Moreover, *Stoner* has been extended beyond hotel rooms to cover other temporary dwelling places, *See, e.g., United States v. Gooch*, 6 F.3d 673, 678 (9th Cir. 1993) (tent pitched in public campground was non-public place entitled to same protection as a hotel room). Courts have also recognized higher expectations of privacy in private living quarters on ships. *See United States v. Alfonso*, 759 F.2d 728, 738 (9th Cir. 1985) ("The private living quarters [of a ship] are at least analogous to a private dwelling. As a result, even in the context of a border search, the search of private living quarters on a ship should require something more than naked suspicion."). These cases suggest that a place set aside for sleeping in private carries with it a much higher expectation of privacy and should be considered a non-public place. *Cf. Minnesota v. Olson*, 495 U.S. 91, 99, 110 S. Ct. 1684, 1689 (1990) ("We are at our most vulnerable when we are asleep because we cannot monitor our own safety or the security of our belongings. It is for this reason that, although we may spend all day in public places, when we cannot

sleep in our own home we seek out another private place to sleep, whether it be a hotel room, or the home of a friend. Society expects at least as much privacy in these places as in a telephone booth — 'a temporarily private place whose momentary occupants' expectations of freedom from intrusion are recognized as reasonable.' " (quoting *Katz v. United States,* 389 U.S. 347, 361, 88 S. Ct. 507, 517 (1967) (Harlan, J concurring)); *United States v. Eagon,* 707 F.2d 362, 366 (9th Cir. 1982) ("Those living on their boats have a greater expectation of privacy at night."), *cert. denied,* 464 U.S. 992, 104 S. Ct. 483 (1983). I believe that a train roomette, an enclosed cabin with a bed and a sink, is no less a temporary dwelling place than a pitched tent in a campground, a private berth on a ship, or a hotel room.

Of course a conductor can enter the roomette at different times during the trip. But the fact that a conductor may enter to check tickets or in case of an emergency, and that an attendant may enter to make the bed and clean up the room the next morning, does not lower the expectation of privacy a passenger has in the roomette with respect to entries into the roomette for purposes totally unrelated to those duties of the train crew. The right of access to the hotel room by managers and housekeepers, for example, does not transform the hotel room into a public place. *See Stoner,* 376 U.S. at 489-90, 84 S. Ct. at 893 (noting that although a person engaging a hotel room gives permission to maids, janitors or repairmen to enter the room in the performance of their duties, such permission does not give police license to enter to search for incriminating evidence); *Chapman v. United States,* 365 U.S. 610, 616, 81 S. Ct. 776, 780 (1961) (explaining that although a landlord had actual authority to enter into a house to "view [a tenant's] waste" and gave his permission to search, the police violated a tenant's constitutional right when they searched the tenant's house since the search was unrelated to viewing waste). I see no reason why

this principle should not apply with equal force in the train roomette setting.

It is also virtually undisputed that the roomette was a cramped and confined setting. The roomette, which was seven feet wide and less than four feet deep, was similar to a moderately sized walk-in closet. The only access to and from the roomette was through a door that was only two feet wide. The hallway outside the doorway was itself only two and a half feet wide. Such cramped confines increase the coercive nature of the encounter, making it less likely that a reasonable person would be free to terminate it. *Cf. Bostick*, 501 U.S. at 429, 111 S. Ct. at 2389 ("The cramped confines of a bus are one relevant factor that should be considered in evaluating whether a passenger's consent is voluntary.").

Making the encounter in the cramped and confined space even more coercive was the fact that Small blocked Kim's only means of exit. Kim argues, and I agree, that the district court's finding that Small did not block the doorway is clearly erroneous. Small claimed that he was kneeling five to six inches from the door during much of the encounter (the district court accepted this testimony, finding that he had been five inches from the door). For Kim to have terminated the encounter by leaving the roomette would have required him to vault over Small, through a two foot doorway into approximately 30 inches of landing space (really somewhat less because Small's body would have occupied a considerable part of the hallway). I think it is inconceivable that a reasonable person would have felt free to ignore Small by passing over him into the narrow hallway where Small knelt during the encounter. *Cf. United States v. Savage*, 889 F.2d 1113, 1116 (D.C. Cir. 1989) (stating that blocking the door would have been relevant to the question of seizure because it would have prevented defendant from leaving the compartment).

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Of course, it might be argued that Kim could have terminated the encounter simply by shutting the door. If so, it might not matter whether Small blocked Kim's exit from the train. But I do not think a reasonable person would think they could terminate the encounter with the police by slamming a door in the officer's face. *See Savage*, 889 F.2d at 1116 (saying nothing about whether the defendant could shut the door). Indeed I am not sure that it matters much to the inquiry whether Kim had alternative methods of terminating the encounter other than exiting the train for the fact that Small may have left Kim a variety of ways of terminating the encounter does not mean that a reasonable person would have felt free to use them. For example, a seizure would certainly have occurred had Small entered into the roomette and shut the door behind him regardless of whether Kim could have terminated the encounter by some other means like telling Small to go away, or climbing out a window.

In any event, I do not believe that Kim could have shut the door during the encounter. The findings the district court made about the configuration of the train car, about the traffic passing up and down the hallway, and Small's claim that he left room for the passengers walking up and down the hallway, make it virtually certain that Small leaned inside the room for important periods of time during the episode and thus prevented the door from being shut.

The majority tries to avoid this problem by stating that Small's testimony that he "was not blocking the door" was uncontradicted. This assertion is simply incorrect. Both Youn and Kim testified that Small was leaning against the side of the doorway, indeed leaning against the door itself. Youn testified that Small was "definitely in the doorway" and Kim testified "He was kind of leaning through the doorway — not into the compartment. He was leaning on the side of the door."

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In my opinion, both Youn's and Kim's testimony that Small was leaning against the doorway throughout the encounter is inherently credible because: 1) leaning against the doorway would be the natural way to conduct a conversation with anyone sitting in the roomette; 2) it would allow Small the ability to conceal the fact that he was passing things to Candelaria throughout the encounter; 3) and it would allow other passengers to pass freely down the hallway. By contrast, I believe Small's testimony that he was five to six inches from the door is incredible because; 1) if Small really had been five to six inches outside the roomette, there would not have been enough room for people to pass without at least acknowledging Small, and nowhere does the tape record an "excuse me" or similar statement by even a single passenger passing Small in the corridor;[3] and 2) given the large amount of noise in the train at the time, it seems doubtful that Kim could have even heard Small's "polite and conversational" voice had Small stayed five to six inches outside the roomette.

Not only did the encounter occur in a non-public, confined setting with Small blocking the only means of exit, but Small also asked Kim and Youn focussed and potentially incriminating questions. Small first asked them about their citizenship status. Apparently, the sight of two Asian men travelling to Philadelphia

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3. If he had been kneeling, as Small testified he had been, his legs would have stuck out approximately 18 inches into the hallway. That would have left other people in the corridor with less than 12 inches to pass without touching Small. And if he had been five to six inches from the doorway, he would have left other passengers with only six to seven inches to pass. Again it is likely that they would have had to step over at least some part of Small's body when they passed Kim's roomette and there is nothing on the tape indicating in any way that they did. Unless people on the train from Los Angeles have worse manners than average people, or are more nimble and svelte, one would have expected something on the tape where the passing passengers acknowledged Small's presence. There is nothing of the kind on the tape.

from Los Angeles made Small think that they might be illegal aliens, and no doubt his questions communicated these thoughts to Kim. He then asked them "[y]ou guys don't have any drugs in your luggage today, do you?" By asking this after looking over their tickets twice and informing them that he was a DEA agent on the train looking for drug traffickers, Small communicated the message that Kim was a specific target of the agent's investigation. At least two courts have found that a seizure occurred when an officer asked similar questions of a suspect. *See United States v. Nunley*, 873 F.2d 182, 185 (8th Cir. 1989) (seizure occurred as soon as agent told defendant that he was part of a narcotics unit and was trying to stop the flow of drugs through the St. Louis airport); *United States v. Gonzales*, 842 F.2d 748, 752 (5th Cir. 1988) (seizure in an airport occurred when a DEA agent told defendant that he was "working narcotics" and asked to look in the bag), *overruled on other grounds, United States v. Hurtado*, 905 F.2d 74 (5th Cir. 1990).[4]

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4. Both *Nunley* and *Gonzales* were airport cases. In each case, the encounter occurred in the airport terminal, a non-cramped and public place where it would have been quite easy for the defendant to walk away. They are therefore much weaker cases than this one, where similar questions were asked to a defendant who was trapped in the confined space of the roomette. As I see it, if it is true that a seizure occurred where similar questions were asked to a defendant in a public setting, then it must be the case that a seizure would have occurred where such questions were asked in a cramped and confined setting.

The majority comments in a footnote that "the dissent has cited to several cases decided in or before 1990 prior to *Bostick* (1991) for a proposition contrary to the *Bostick* language [that police may ask potentially incriminating questions without converting an encounter into a seizure]. Those cases also conflicted with *Little*." Maj. Op. at 13 n.6. I see no conflict between *Bostick* and either *Nunley* or *Gonzales*. Both cases employ the same totality of the circumstances approach endorsed in *Bostick*, *Nunley*, 873 F.2d at 185; *Gonzales*, 842 F.2d at 748. Apparently the majority believes that the language from the *Bostick* case makes the question whether focused and

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Furthermore, not only did the question seek to incriminate Kim, but the questions were also blunt and direct. Although the majority dismisses the importance of this fact by stating that Small's tone was polite and conversational, that response misses the point. Bluntness and directness describe the type of questions

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incriminating questions were asked irrelevant to the totality of the circumstances inquiry. I see nothing in the language of *Bostick* that leads to such a conclusion. *Bostick* merely says that police may approach a person and ask potentially incriminating questions without necessarily converting the encounter into a seizure. It does not follow from such a proposition that asking incriminating questions is irrelevant to the question of whether a reasonable person would have felt free to terminate the encounter.

Indeed, a number of post-*Bostick* cases recognize that asking incriminating questions — like asking a person whether he or she is carrying drugs — is relevant to the question whether a person was seized. *See, e.g., United States v. McCarthur,* 6 F.3d 1270, 1276 (7th Cir. 1993) (stating that one relevant consideration is whether the police indicate through their questioning that they were a specific target, like asking whether they are carrying drugs); *United States v. Adebayo,* 985 F.2d 1333, 1338 (7th Cir. 1993) (discussing as relevant to the seizure analysis whether the police asked the defendant whether he was carrying drugs, and explaining *United States v. Borys,* 766 F.2d 304 (7th Cir. 1985), which held that it is relevant to the seizure question whether the officer informs an individual that he is conducting a drug investigation and then asks the individual if he has drugs in his possession), *cert. denied,* 113 S. Ct. 2947 (1993); *United States v. Wilson,* 953 F.2d 116, 122-23 (4th Cir. 1991) (persistent questioning, even when polite, by itself, created a seizure). *Wilson* is particularly noteworthy because in that case there were no coercive elements of the encounter other than the questioning the police. The panel in that case could not have reached its result if asking incriminating questions was irrelevant to the inquiry.

Thus the majority's claim that the dissent ignores *Bostick* is misplaced. Properly construed, *Bostick* allows courts to consider the incriminating nature of the questioning as one part of the totality of the circumstances. And this conclusion is fully consistent with post-*Bostick* case law.

asked, not the manner in which they were asked. *See, e.g., Nunley,* 873 F.2d at 184-85 (not even mentioning whether the officer's tone was confrontational or rude to the defendant). Although the tone of the officer's voice is relevant to the extent that a forceful tone of voice may make a reasonable person think that they must comply with the officer's requests, *see United States v. Savage,* 889 F.2d 1113, 1115 (D.C. Cir. 1989), the lack of such a forceful tone does not entirely deprive blunt and direct questions of their coercive force. The questions Small asked Kim about citizenship and drug trafficking were as sharp and focussed as they could be under the circumstances, given that Small had absolutely no articulable suspicion that any crime had been committed, let alone that Kim had committed a crime.

Finally, it is undisputed that Small failed to advise Kim of his right to decline the agent's requests or terminate the encounter. The majority dismisses this fact as unimportant stating that "[w]hile such advice may well be evidence of the consensual nature of an encounter following the advice, the absence of such advice does not necessarily eliminate the consensual nature of the encounter." This statement is typical of the majority's approach to this case. The majority examines each fact of the encounter in isolation and considers whether each fact, by itself, would have made a reasonable person believe he was not free to terminate the encounter. *See* Maj. Op. at 8 ("Nor do we believe a confined area in a train is *inherently* coercive"); Maj. Op. at 10 ("we do not believe that Kim's expectation of privacy [in the roomette] has any *overriding* importance in our analysis as to whether a seizure occurred"); Maj. Op. at 11 ("potentially incriminating questions do not *by themselves* make an encounter coercive") (emphases supplied).

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The clear implication of the majority's analysis in this case is that, unless the defendant can come forward with a piece of evidence that would make the encounter a per se seizure, the defendant will not be able to show that there was a seizure. In my opinion, such an approach transforms the "totality of the circumstances" analysis of *Bostick* into a mirror image of the per se approach rejected in *Bostick*. *Bostick* teaches that a court must consider all of the evidence *in combination* to determine whether the circumstances were such that a reasonable person would not feel free to terminate the encounter. The question whether one factor does or does not *necessarily* create a seizure is simply no longer relevant after *Bostick*.

Perhaps as a result of this failure to implement the *Bostick* standard, the majority fails to recognize that although Small's failure to advise Kim that he had a right to terminate the encounter may not by itself create a seizure, it nevertheless could tip the balance under a true totality of the circumstances analysis. This is particularly true in this case because the circumstances are otherwise so similar to *Bostick*. Of critical, and perhaps decisive, importance in *Bostick* was the fact that the two police officers questioning Bostick on the bus had "specifically advised Bostick that he had the right to refuse consent." 111 S. Ct. at 2385, 2388. If we believe that *Bostick* represents a case in which the actions of the police were almost coercive enough to amount to a seizure, the absence of such a warning in a situation similar to that in *Bostick* should be enough to tip the balance.

In sum, given that the setting was non-public and that Small was asking Kim and Youn incriminating questions while blocking the door to the roomette, Small's failure to advise Kim that he could terminate the encounter made the encounter a seizure. I

believe that no reasonable person would have felt free to terminate the encounter under such circumstances.[5]

II. THE SCOPE OF CONSENT

Even if Small did not seize Kim prior to his search of the luggage, Small's search of the sealed vegetable protein canisters he found within the luggage violated the Fourth Amendment because it exceeded the *scope* of the consent.[6] As the majority mentions,

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5. Of course, Small's seizure of Kim would not violate the Fourth Amendment if he had reasonable suspicion to detain him. *See United States v. Sokolow*, 490 U.S. 1, 7, 109 S.Ct. 1581 (1989); *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868 (1968). Small did not, however, have reasonable suspicion. At the time Small asked Kim whether he had drugs in his luggage (the time that I believe the seizure occurred because by this time the encounter was not only in a cramped, non-public space, but had involved focused and incriminating questioning) Small knew the following facts: 1) Kim and Youn had purchased one-way tickets; 2) the tickets were purchased for cash; 3) they had upgraded to a sleeper car en route from Los Angeles; 4) they were travelling to Philadelphia; 5) Kim was a naturalized citizen born in Korea; 6) Youn was in the U.S. Marines; 7) Youn's ticket was in the name of "Terry Park" (there is no evidence that Small knew that this was an alias at the time of the encounter, however); and (8) the train manifest had the name "Wonz" assigned to the sleeper. These facts are all consistent with innocent travel, and they fall woefully short of the particularized suspicion sufficient to justify a *Terry* stop. *Compare United States v. Coggins*, 986 F.2d 651 (3d Cir. 1993) (reasonable suspicion exists when the defendant matched the standard profile for drug couriers, was using a false name, rented a car for only a few hours before returning it, appeared nervous and highly agitated, and was traveling with two recognized drug traffickers).

6. The majority addresses the question whether Kim voluntarily consented to Small's search of his luggage and concludes that Kim did so consent. It then concludes that "the district court was correct in finding that Kim voluntarily consented to the search of his luggage." I am not entirely sure why the majority has chosen to undertake this particular consent analysis. Kim apparently concedes that,

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Small asked to search Kim's bag and Kim said he could. Small then saw six metal-lidded, factory-sealed canisters labelled "Natureade All-Natural Vegetable Protein." Without asking Kim's permission, and after Kim told Small that they were meant to be a present, Small opened the factory seal and handed the canister to Candelaria asking him to poke around inside the can to see what he could find. The question is whether Small reasonably believed that Kim's consent to search his luggage gave Small permission to open the canisters. The majority holds that it did. I disagree.

We know from *Florida v. Jimeno*, 500 U.S. 248, 111 S. Ct. 1801 (1991), that the scope of a search is defined objectively and that under such an approach a suspect's general consent to search a car includes consent to search a folded paper bag lying on the floor of the car. 111 S. Ct. at 1804. But we also know that consent to search a larger container does not include consent to search *all* smaller containers inside. *Id.* As *Jimeno* itself stated, "[i]t is very likely unreasonable to think that a suspect, by consenting to the search of his trunk, has agreed to breaking open of a locked briefcase within the trunk." *Id.* (citing *State v. Wells*, 539 So. 2d 464 (Fla. 1989)). Each officer in *Jimeno*, *Wells*, and this case requested consent to search for narcotics; thus the defendant in each case consented under similar contexts, making the scope of their consent similar. Hence the question ultimately posed by this

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absent a seizure, his consent to search the luggage (though not the sealed container) was voluntarily given. Of course, if there was an improper seizure, Kim's consent to the search of the luggage pursuant to that improper seizure was involuntary, absent a break in the causal chain. Apparently, the majority concedes that there was no break in causation between Small's initial encounter with Kim and his search of the bag. Thus, if the seizure was improper, the fruits of the search should have been suppressed.

case is whether the factory sealed canister is more like a locked briefcase or a folded paper bag.[7]

The majority's entire discussion of this question is as follows: "cans such as found in the case *sub judice* are not similar to locked briefcases." That is simply a conclusion. There is no discussion of the relevant differences between the two objects for purposes of the reasonable scope of a consent to search. In my opinion, the difference between the folded paper bag in *Jimeno* and the locked briefcase in *Wells* has to do with the owner's greater expectation of privacy in the contents of the briefcase than in a paper bag, and in the owner's greater property interest in not having the lock on his breifcase broken than in not having his paper bag opened.

I believe, however, that a heightened expectation of privacy can be evidenced by something other than a lock — gift-wrapping around a package, for example. Of course a sealed package like a can of food or a box with plastic shrink-wrap around it does not really evidence a strong privacy interest. Labels on products will often display prominently the contents of a package. This is where the second distinction becomes important, however. Consent to search property cannot reasonably be construed to mean consent to damage the property. There is a strong property interest in sealed packages, and opening them often damages the value of that interest.

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7. The majority frames the issue as a matter of whether or not the canisters reasonably could have contained drugs. It frames the issue in this way because it abstracts from *Jimeno* the proposition that when an officer requests permission to search for drugs and such permission is given, "the permission extends to any items within that area that a reasonable person would believe to contain drugs." Such a reading of *Jimeno* cannot be right. *Jimeno* clearly states that it would have been "unreasonable" to think that a suspect consents to the search of a locked briefcase inside a car trunk when he consents to search of a trunk. Yet it certainly is reasonable to think that a locked suitcase in those circumstances contains drugs.

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In my opinion, the Natureade All-Natural Vegetable Protein canister Small took from Kim's luggage was no different than a can of tuna fish, a carton of milk, or a locked briefcase, all of which would be seriously damaged once opened. Once the seal was broken, the canister simply would not be able to keep its contents from spoilage to the same extent it could before. And if it was meant to be a gift, as Kim told Small before he opened the lid, it would not be much good once opened. I believe it to be unreasonable for a police officer to think that consent to search luggage includes consent to open up a sealed package, particularly one that bears no visible evidence of tampering and which the officer has been told is going to be used as a gift.

Although the majority cites *United States v. Springs*, 936 F.2d 1330, 1334-35 (D.C. Cir. 1991), to support its conclusion that an officer can break into sealed containers during a consensual search, I do not believe *Springs* stands for this proposition. In *Springs*, although the baby powder container had a lid (which the majority somewhat disingenuously calls a "seal"), there was no evidence in the opinion that the container was sealed in the sense that the baby powder had a factory vacuum seal covering its opening. In fact, the baby powder container had pry marks on it suggesting that someone had already opened the container. *Id.* at 1332. Thus *Springs* really only holds that a police officer can remove the lid of an obviously already opened container when he is looking for drugs.

Springs reached its conclusion in part by distinguishing the baby powder container from the locked briefcase discussed in *Jimeno* on two grounds: 1) the baby powder container did not have a key, and 2) opening the baby powder container would not render it useless. For the reasons discussed above, neither distinction forecloses Fourth Amendment protection in this case. First, as was mentioned above, although the locked nature of the briefcase is strong evidence of the owner's intent to keep its contents private, it

does not follow that a key or lock is necessary for a box or container to be outside the scope of a consensual search of this kind. Second, *Springs'* discussion of "useless[ness]" suggests agreement with the principle that consent does not reasonably extend to searches that will physically damage the property being searched. As discussed above, when applied to the facts of this case, this principle suggests that Small exceeded the scope of Kim's consent.

It is becoming a shibboleth in this area of the law for courts to say that drugs are usually not scattered loosely throughout larger containers. *See, e.g., Jimeno,* 111 S. Ct. at 1804; *Springs,* 936 F.2d at 1334-35. I fully concede that it is appropriate for a police officer to look at smaller containers found in luggage that may possibly contain drugs. But once the police officer has looked at the item and it is either wrapped or sealed, it is unreasonable for the police officer to think that the consent to search the luggage gives him license to damage the item by opening it without asking permission.[8]

I respectfully dissent.

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for the Third Circuit

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8. Moreover, before Small opened the canister, Youn said, "[i]ts closed." I believe that a reasonable officer would take that to mean that he should not open the container. The majority attempts to save this problem away in part by stating that Youn's statement did not mean that Small should not open the canister but rather that he simply did not know what was in the canister. According to the majority, "Youn's answer was another way of saying, 'I don't know because it is closed.' " But Youn did not say "I don't know because it is closed." He said, "It's closed."

APPENDIX C — OPINION AND ORDER OF UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA FILED MAY 12, 1993

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CRIM. NO. 93-87

UNITED STATES OF AMERICA

VS.

YONG HYON KIM

MEMORANDUM OPINION AND ORDER

WEINER, J. MAY 12, 1993

Defendant was indicted on charges of possession of methamphetamine "ice" with intent to distribute in violation of 21 U.S.C. § 841(a)(1) and conspiracy to distribute methamphetamine "ice" in violation of 21 U.S.C. § 846. Defendant now moves to suppress the "ice" seized during a consent search of his luggage aboard an Amtrak train by a special agent of the Drug Enforcement Administration ("DEA") on the ground that his consent was coerced. He has also moved to suppress statements that he made to the agent at the time of the encounter and the day after his arrest on the ground that the statements were the product of an illegal seizure. On May 3, 1993, the Court held an evidentiary hearing on the motion to suppress after which the Court denied the motion from the bench. This Opinion supports that ruling.

On August 26, 1992, DEA Special Agent Kevin Small ("Small") and Albuquerque Police Officer Sam Candelaria

("Candelaria") were working as part of a drug interdiction unit at the Amtrak train station in Albuquerque, New Mexico. Small obtained from a ticket agent the manifest for Amtrak train #4 originating in Los Angeles en route to Chicago with a scheduled stop in Albuquerque. Small chose this particular train because the DEA had had problems with persons transporting drugs through Albuquerque to the East. Small scanned the manifest for individuals who might have purchased a one-way ticket with cash within one to two days of departure because this method of purchase usually was indicative of drug activity. The roomette (sleeping compartment) defendant and his companion occupied, #12 in car #31, was not on the manifest but appeared to Small to be occupied. Small deduced that the roomette had to be an upgrade. According to Small, drug couriers frequently buy a regular ticket then request an upgrade when they are on the train. Small had not received a tip from an informant about defendant and had no other reason to believe defendant was carrying drugs in his luggage. Nevertheless, Small and Candelaria decided to question the occupants of roomette #12. Before knocking on the door, Small turned on a small body recorder to record the encounter. The recording was played at the evidentiary hearing on May 3, 1993.

The roomette defendant and his companion occupied was approximately seven feet long and eight feet high. Inside there were two seats facing each other. The corridor outside the room was approximately two to two and a half feet wide. The roomette was located in a "well-trafficked" area of the train car, next to the luggage storage room and next to a stairwell leading to the upper floor of the sleeping car. People constantly passed by the roomette during Small's encounter with defendant. In fact, their voices can be heard on the tape. Directly across from defendant's room was a room utilized by the train conductor. Small testified that at least during part of the encounter with defendant, the conductor was in

this room conversing with a passenger. Small also testified that the conductor passed in front of the roomette several times during the encounter and the conductor was visible to defendant. Three to five feet from defendant's roomette was a larger family room. Small testified that during the encounter, a woman and some children were in this room. Small testified that the entire encounter was visible from this family room.

Small, who was in plain clothes and was not visibly armed, knocked on the door of roomette #12 which was closed with the curtain drawn. Defendant opened the door. Defendant's companion, Song W. Youn ("Youn"), was seated. Small identified himself as a police officer and showed defendant his DEA badge. Small testified that defendant "looked at" the badge. Both defendant and Youn testified that defendant asked Youn in Korean, "What does that mean?" Defendant testified that Youn explained to him in Korean that Small was a police officer and that defendant then "understood." Candelaria did not come to the door but remained just off to the right of the door in a stairwell where he could not be seen by either defendant or Youn.

After identifying himself as a law enforcement official, Small asked, "Can I talk with you for a second?" It is unclear from the tape and testimony whether it was the defendant or Youn who replied, "yeah." At this point, Small kneeled in the corridor approximately five inches from the entrance to defendant's roomette. Small testified that he did not block the doorway. The door remained open for the duration of the encounter. After asking them their points of origin and destination, Small asked if they had their tickets. Small did not advise them that they had the right to refuse to show Small their tickets. Again it is unclear whether it was defendant or Youn who replied, "yeah." Youn handed Small their tickets which were in the names of Yong Kim and "Terry

Park." Small said, "thank you." Small asked whether they had any picture identification. Youn stated that he did not. Small handed the tickets back to defendant and Youn. Small then asked them questions about their citizenship. During the questioning, Small spoke in conversational and polite tones.

At this point, several persons walked by defendant's roomette. The voices of these unidentified people can be heard on the tape. Candelaria whispered to Small from the stairwell that the train reservation for roomette #12 was in the name of "Wonz." There was no indication that defendant heard Candelaria at this or any other time. As a result, Small asked Youn, "Can I see your tickets again, please? Would that be all right?" Small looked at the tickets and handed them back to Youn.

Small told defendant and Youn that he worked for the DEA and that the DEA has been having problems with people smuggling drugs out of Los Angeles back East. He did not show his DEA badge. He asked in a polite tone whether either defendant or Youn had any drugs in their luggage. Defendant replied, "no." Small then asked,

"Would you voluntarily consent for me to search?" Defendant replied, "sure." At this point, unidentified voices are heard on the tape. Small did not advise defendant that he had the right to refuse the search and terminate the encounter. Both Defendant and Youn testified that they did not believe they had the right to refuse a search or had the right to terminate the encounter entirely. Defendant testified that an individual does not have the right to refuse in Korea.

Small pointed to one leather bag and asked if it belonged to the defendant. Defendant replied, "yes." Unidentified voices are again

heard on the tape. Small opened the bag and saw six metal-lid sealed cannisters of "Naturade All-Natural Vegetable Protein." Small asked them what it was. Defendant replied, "Vegetable Protein." Small asked defendant what it was for. Defendant stated, "I don't know. I got it for a present." Small asked defendant where he got it. Defendant stated, "We bought it in L.A." Small asked defendant if he knew what the cannisters contained. Youn answered, "They're closed." Small did not ask for permission to open the cannisters. Small opened one of the cannisters and asked defendant, "Who gave them to you?" Defendant replied, "The guy in L.A." When Small asked, "What guy", there was no answer. Small handed the cannister to Candelaria who was still out of sight in the stairwell. Candelaria reached into the cannister and pulled out a plastic bag containing methamphetamine "ice." He told Small who then arrested defendant and Youn.

Both Small and DEA agent Farnsworth testified that defendant spoke English "very well." We also reach that conclusion after listening to defendant on the videotape and at the evidentiary hearing. Defendant attended high school in Philadelphia and had been in the United States as a permanent resident alien for 12 years. Small testified that Candelaria read defendant his Miranda rights and that defendant understood them. The day after his arrest defendant waived his Miranda rights. Youn testified that he had been arrested once before at which time he was explained his rights. Defendant testified that he had been "assisting" a Philadelphia police officer on various unidentified matters since 1991.

Defendant argues that the encounter which took place between Small and defendant was not a voluntary consensual encounter but rather was a seizure within the meaning of the Fourth Amendment which must be supported by reasonable suspicion.

Appendix C

Defendant argues that the encounter became a seizure as soon as Small knocked on the door and began asking defendant questions. Defendant bases his argument on the contentions that two officers entered defendant's roomette and presented their badges, defendant was confined during the encounter to his "private traveling berth", defendant was asked "incriminating questions" that "would tend to communicate to a reasonable person that [he was] the specific target of the agents' investigation [and] was unable to terminate the encounter, defendant had a limited understanding of English and that he was not informed of his right to refuse the search. The government contends that Small's encounter with defendant was entirely consensual and therefore did not amount to a seizure.

The government has the burden of proving by a preponderance of the evidence that the search was made pursuant to a voluntary consent. *United States v. Velasquez,* 885 F.2d 1076, 1081 (3d Cir. 1989) (quoting *United States v. Matlock,* 415 U.S. 164, 177 (1974)). The Supreme Court has held that "when a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the burden of proving that the consent was, in fact, freely and voluntarily given." *Bumper v. North Carolina,* 391 U.S. 543, 548-549 (1968). A seizure, on the other hand, passes constitutional muster only if supported "by a reasonable and articulable suspicion that the person seized is engaged in criminal activity." *Reid v. Georgia,* 448 U.S. 438, 440 (1980).

In determining whether a police-citizen encounter is consensual or amounts to a seizure within the Fourth Amendment, we inquire "[w]hether taking into account all of the circumstances surrounding the encounter, the police conduct would 'have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business,' " *Florida v.*

Bostwick, 111 S.Ct. 2382, 2387 (1991) (quoting *Michigan v. Chesternut*, 486 U.S. 567, 569 (1988). In *Bostwick*, the Supreme Court held that a police encounter on a bus does not necessarily constitute a seizure within the meaning of the Fourth Amendment merely because it takes place in the "cramped confines" of a bus. *Bostwick, supra* at 2389. The Court stated that the Fourth Amendment inquiry applies equally to police encounters on trains. *Id* at 2388. The *Bostwick* decision, however, addressed only an encounter in the common areas of a bus or a train. It did not address an encounter in a private area of a train such as a roomette.

Neither the Supreme Court nor our Court of Appeals has had occasion to apply the *Bostwick* inquiry to a police-citizen encounter in a private area of a train such as a roomette. Defendant directs our attention to two recent decisions from the United States Court of Appeals for the Tenth Circuit which, ironically, involve citizen encounters with Small aboard Amtrak trains stopped at the Albuquerque station. The cases from the Tenth Circuit are *United States v. Ward*, 961 F.2d 1526 (10th Cir. 1992) and *United States v. Bloom*, 975 F.2d 1447 (10th Cir. 1992). In *Ward*, Small and a detective approached the defendant's small private roomette along with the conductor. The conductor knocked on the door, and when defendant opened the door, the conductor said, "There's some gentlemen here that would like to see you." The conductor then departed. The detective leaned inside, identified himself as a police officer, and both Small and the detective displayed their badges. The defendant granted the detective permission to enter his roomette. The defendant was alone. The detective entered and sat down with his knees between defendant and the door. The door remained open at all times. There was conflicting testimony as to whether anyone passed by in the hallway during the encounter. Small did not enter the roomette, but nevertheless was visible to the defendant. Both Small and the detective were in plain clothes and neither displayed a weapon. Neither Small nor the detective

touched or physically restrained the defendant and both spoke in a regular tone of voice. The detective asked defendant questions regarding defendant's identification and luggage, as well as other questions about his itinerary and ticket. The defendant was never informed of his right to terminate the encounter. In finding that the actions of Small and another police officer amounted to a seizure, the *Ward* Court placed special emphasis on the fact that:

> 1. The defendant "was not in an open public place where he was within view of persons other than law enforcement officers." *Ward* at 1531. "In this Fourth Amendment inquiry, it is relevant that an individual traveling in a private train roomette has a higher expectation of privacy than an individual traveling in a public passenger car of the train." *Id.*
>
> 2. Defendant was alone at the time of the encounter and was questioned by two law enforcement officials, one of whom entered the roomette and did not leave.
>
> 3. After making general inquiries, the detective asked defendant pointed and potentially incriminating questions, thus conveying the message that defendant was being singled out.
>
> 4. The law enforcement officials did not advise defendant that he had the right to terminate the encounter.

In *Bloom*, Small knocked on the door of the defendant's

roomette while a United States Border Patrol Agent remained out of sight in the unoccupied adjacent roomette. When defendant answered the door, Small identified himself as a DEA agent, showed his badge and asked to speak with the defendant. After defendant agreed, Small began to question defendant while standing in the corridor to the side of the door. No other people passed the roomette or otherwise observed the encounter. Small asked defendant general questions about his itinerary and identification. At some point during the questioning, the border patrol agent stepped out of the adjacent room and questioned defendant about his place of residence. In response to a direct question posed by Small, the defendant stated that he did not have any drugs in his luggage. At no time was defendant advised that he had the right to terminate the encounter. Defendant refused to allow Small to search his luggage. The Court in *Bloom* also found that this encounter amounted to a seizure because:

> 1. Defendant was alone in the confines of a private train compartment and not in view of persons other than law enforcement officials.
>
> 2. The presence of two law enforcement officials increased the coerciveness of the encounter since defendant was outnumbered.
>
> 3. The border patrol agent was in uniform and visibly armed.
>
> 4. Small's "directly incriminating questions" in a nonpublic setting.
>
> 5. Neither of the law enforcement officials advised defendant he had the right to terminate

> the encounter, a fact which is entitled to greater weight than usual given the nonpublic nature of the setting.

Although it is a close question, we believe the case *sub judice* is distinguishable from *Ward* and *Bloom* in certain significant aspects. First and most significant, we find that the encounter in the case *sub judice*, unlike the encounters in *Ward* and *Bloom,* was not a nonpublic encounter. The uncontroverted testimony at the evidentiary hearing revealed that the roomette defendant shared with Youn was located in a "well-trafficked" area of the train car near the luggage storage area and next to the stairwell leading to the upper floor of the sleeping car. During at least part of the encounter, the conductor was talking to a passenger in the conductor's room directly across from defendant's roomette. Several times during the encounter, the conductor walked by the roomette. Many persons also walked by the defendant's roomette during the encounter as is evidenced by their voices on the tape. A woman and some children also witnessed the encounter from a family room which was located next to the conductor's room. Thus, unlike the defendants in *Ward* and *Bloom,* the defendant in the case *sub judice was* within view of others than law enforcement officials.

Another significant distinction between the encounter in this case and those in *Bloom* and *Ward* is that in *Ward* and *Bloom* each defendant was alone and outnumbered at the time of questioning by two law enforcement officials whereas in this case defendant was accompanied by his friend, Youn, in the roomette and was questioned by only Small. Candelaria did not reveal his presence until he discovered the drugs and there was no testimony that either defendant or Youn were aware of Candelaria's presence in the stairwell before then. Thus, from his vantage point, defendant

could believe that it was the law enforcement official who was outnumbered. In addition, unlike the border patrol agent in *Bloom*, Small was in plain clothes and was not visibly armed. Small also did not enter the roomette as did the detective in *Ward* and did not block the door. *See United States v. Tavolacci*, 895 F.2d 1423, 1425 (D.C.Cir. 1990) ("Nor does the mere presence of officers in the doorway of a train roomette (and the adjacent aisle) defeat the 'free to leave' test."); *United States v. Savage*, 889 F.2d 1113, 1117 (D.C. Cir. 1989) ("The presence of the detectives in the doorway of the compartment and its adjacent aisle did not, we believe, prevent a reasonable person in Savage's position from declining to talk with the police or from leaving the compartment . . . The detectives' positions were compelled by the location in which they were conducting their interview; there was no other place for them to stand.) Likewise, the fact that defendant and Youn were "confined" to the roomette was the result of riding on the train and not the result of the conduct of Small. Thus, the increased element of coerciveness that was present in *Ward* and *Bloom* is not present in this case.

Other facts point to the consensual nature of the encounter. Throughout the questioning, Small used conversational tones. He did not shout at or threaten defendant, nor physically touch him. He made general inquiries to *both* defendant and Youn and gave no indication that he specifically suspected either defendant or Youn of carrying drugs. It was not until Candelaria discovered the drugs that Small's tone became forceful. *See Savage, supra* (although presence of officers in doorway of train compartment and adjacent aisle did not by itself create a seizure, the encounter became a seizure when the officer's questioning became "direct and probably forceful"). Although Small admittedly asked defendant a "potentially incriminating" question about whether he or Youn were carrying drugs, we find that the incriminating effect is

mitigated by the fact that the encounter was not nonpublic. This was not the case in *Ward* and *Bloom*. In addition, Small questioned defendant around 4:00 P.M. and returned defendant's and Youn's tickets immediately after examining them. *See United States v. Battista,* 876 F.2d 201, 204 (D.C. Cir. 1989) (combination of the early morning hour of 6:30 a.m., Battista's partial undress, and police keeping his ticket and identification resulted in detention.) Finally, it would not be unreasonable to infer that based on his self-assured and confident demeanor at the evidentiary hearing, defendant consented to the search not because of any display of authority but because he believed Small would not find the "ice" in metal-lid sealed cannisters. *See United States v. Crespo,* 834 F.2d 267, 272 (2d Cir.) *cert. denied,* 485 U.S. 1007 (1988) (consent to search was voluntary when defendant agreed to search because "likely that he believed that the agents would not find the materials, which were in a closet on a shelf hidden in a bag.")

We recognize that both defendant and Youn testified that they did not believe they were free to terminate the encounter and that defendant testified that in Korea one must obey the police. However, Youn also testified that he had been arrested once before and defendant testified that he had been "assisting" a Philadelphia police officer since 1991. From this experience, defendant must have been familiar with at least the basic tenets of American law enforcement procedure. Defendant attended high school in Philadelphia and has been a permanent resident alien in the United States for the past 12 years. In addition, both Small and Farnsworth testified that defendant spoke English "very well" and we note that defendant demonstrated this ability at the evidentiary hearing. In fact, defendant declined to have an interpreter present at the hearing. Although Defendant and Youn testified that when Small identified himself defendant asked Youn what Small had said, Youn testified that he explained to defendant in Korean and that

defendant "understood." We find absolutely no evidence that defendant was not fully aware of what was happening during the encounter.

We note that the inquiry would be much less difficult if Small had advised the defendant that he had the right to terminate the encounter or refuse consent. However, as the *Ward* Court stated, "[u]nder the totality of the circumstances test, of course, this one factor by itself does not determine whether a seizure has occurred." *Ward* at 1533 (citation omitted). Nor is this factor entitled to greater weight as it was in Bloom since we have already found that this encounter was public. In any event, Small did not put any kind of pressure on defendant to get his consent. He merely asked for permission. As noted above, defendant may have consented because he did not think the methamphetamine would be found.

Based on the "totality of the circumstances", we find that nothing in the police conduct during the entire encounter between Small and defendant leading up to the search of defendant's bag would have communicated to a reasonable person that he was not free to ignore the police presence and go about his business. Accordingly, we find that the encounter was a voluntary consensual one and not a seizure. Therefore, Small did not need reasonable suspicion to search defendant's bag. The defendant's motion to suppress the evidence seized by Small will be denied.

Appendix C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CRIM. NO. 93-87

UNITED STATES OF AMERICA

VS.

YONG HYON KIM

ORDER

The motion of the defendant to suppress physical evidence and statements is DENIED.

The motion of the defendant for discovery is DENIED as moot.

The motion of the defendant for continuance of trial is DENIED as moot.

IT IS SO ORDERED.

s/ Charles R. Weiner
CHARLES R. WEINER